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OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
DURING THE YEAR
1858.
BY JOHN W. HEAD,
STATE REPORTER.
VOLUME I.

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**JUDGES OF THE SUPREME COURT
OF TENNESSEE.**

HON. ROBERT J. MCKINNEY, - - - - KNOXVILLE.
“ **ROBERT L. CARUTHERS, - - - - LEBANON.**
“ **ARCHIBALD WRIGHT, - - - - MEMPHIS.**

ATTORNEY GENERAL OF TENNESSEE,
J O H N W . H E A D ,
GALLATIN.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE,
FOR THE
EASTERN DIVISION.

KNOXVILLE: SEPTEMBER TERM, 1858.

EDWARD WATTERSON *et al.* v. HENRY WATTERSON

1. **WILL.** *Testator's knowledge of contents. Evidence. Practice.* The fact that an illiterate testator had knowledge of the contents of the paper propounded as his will, must be shown by such testimony as is satisfactory to the jury; but it is not indispensable that it should appear that such knowledge was acquired from hearing the will read. In a case, however, where the testator could not write or read writing, and the draftsman of the will was the principal legatee, the jury, upon such a question, should be instructed, that information acquired from the draftsman would not be sufficient. In all suspicious cases, the testimony as to the testators knowledge, should be clear and convincing; equivalent, at least, to having heard the will read by a disinterested and unimpeachable party.
2. **PRACTICE.** *Judicial discretion.* The Supreme Court will not, as a general rule, interfere with the rulings of an inferior court upon matters purely of discretion. To authorize such interference in any case, it must clearly appear that such discretion has been improperly exercised, and that great hardship and injustice was the result of it.
3. **CASES CITED.** *Patton vs. Allison*, 7 Humph., 334; *Cox vs. Cox*, 4 Sneed, 88.

FROM HAWKINS.

This was an issue *devisavit vel non* from the Circuit Court of Hawkins county, upon the will of Margaret

Edward Watterson *et al.* v. Henry Watterson.

Watterson, deceased. At the September Term, 1857, before Judge PATTERSON, verdict and judgment were in favor of the will. The contestants appealed in error.

J. B. HEISKELL and C. W. HALL, for the plaintiffs in error.

T. A. R. NELSON and L. C. HAYNES, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

The defendant in error propounded the paper in contest, as the will of his mother, Margaret Watterson. The plaintiffs in error are the children of James Watterson, deceased; the other son of said Margaret, who deny that the said paper is valid as her will. An issue of, *devisavit vel non*, was formed in the Circuit Court of Hawkins, and decided in favor of the plaintiff, and the will was established.

It appears from the bill of exceptions, that the said Margaret had but the two children, Henry and James; that she apparently had equal affection for them; and often declared that she intended to divide her property equally between them. She died in 1850 or 1851, at the advanced age of, near, ninety years. In February, 1854, this paper was presented for probate. It is dated in 1826, and gives almost her entire estate to Henry, *by whom it was written*. It was witnessed by Thomas and Henry Larkins. They lived eight or ten miles from her. She, in company with the wife of her son Henry, went to their houses, and got them to witness and keep

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the will for her. She was illiterate, and could neither write, nor read writing. Henry Larkins says, that "she took me out and told me she had her will, and she wanted me to witness it and keep it. I told her I would read it to her; *she said it was her will, and she knew what was in it.* She stated as the reason she would not let me read it, that I would be talking about it. She made her mark to the will, and then I and Thomas Larkins witnessed it at her request, and in her presence. I then sealed it up, and she told me to keep it." The statement of Thomas Larkins is very much the same in substance.

There is no direct evidence that the paper was ever read to her, and the first question is, Whether that is indispensable in the case of illiterate persons? The Circuit Judge charged that it was not, but it was enough for the jury to be satisfied that she understood the contents, no matter by what means. "It was not necessary," he said, "for the plaintiff to show by the evidence, that the will was read to the testatrix before she signed it; all the law requires in such cases is, that the jury should be satisfied from the proof, that the testatrix, at the time of the execution of the will, fully understood its contents;" that this knowledge might be made out by positive or circumstantial testimony; that the declarations of the testatrix at the time, and previous to the execution of the will, was competent testimony to show knowledge of contents."

There are two grounds in this case to excite suspicion and distrust: the illiteracy of the testatrix, and the fact that the paper was written entirely by the principal legatee.

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The general rule, that the free and voluntary execution of a paper by any one in his right mind, will be sufficient, *prima facie*, to establish a knowledge of its contents, does not apply to a case in either of these categories, much less to one that falls into both; or rather, these cases are exceptions to the general rule. In such cases, the presumption of knowledge does not arise, and the burthen of proving it lies upon the propounders. The doctrine in relation to a will written by a legatee under it, was discussed and settled by this Court, in the case of *Patton vs. Allison*, 7 Humph., 334-5. It is there held, in conformity to the English authorities cited, that the circumstance should excite strong suspicion, and calls upon the Court to be vigilant and zealous in the examination of the evidence in support of the will, and not to pronounce in its favor unless all suspicion is cleared away, and plenary evidence adduced of fairness, and knowledge of the contents. The Court reversed that case because the Court below charged, that previous declarations in conformity with the will were insufficient to establish the fact of knowledge. It was held that this might, or might not be sufficient; but that was a question for the jury, and not the Court. It was not for the Court to prescribe any particular species, or measure of proof; but only that it must be full and sufficient in the face of the suspicion against it, to satisfy the mind that the testator knew the contents, and was in no way imposed upon. In that case, the most satisfactory evidence on the point to be made out, would certainly be the fact that the testator had read, or heard another read the paper. But still the case may be made out by proof of other facts. If {

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{ then the only ground of objection was, that the will
was written by a beneficiary under it, there would be no
error in the charge. }

But suspicions and objections against this will, are accumulated. The testatrix was illiterate—unable to read or write, very old, kept secret what she had done from all the world, except the witnesses, who lived at a distance from the family; and, in addition to all this, the paper was not propounded for several years after the death of the party, and more than a quarter of a century after its date. Certainly all these circumstances combined, should enjoin upon the Court and jury the necessity of the strictest scrutiny into the facts, and cause them to require the most satisfactory and conclusive proof, not only that the contents were perfectly understood, but, that the whole thing was fair and honest in every particular. This should have been emphatically impressed upon the jury in the charge.

But the particular question raised upon the charge, in the argument, is, whether any other means of knowing the contents of the paper, but by hearing it read, will be sufficient, in the case of an illiterate person. His honor held, that knowledge was sufficient, no matter by what means acquired; that reading was not the indispensable and only mode. In this case, the only proof before the jury on the point in question was, that she said at the time the paper was witnessed by the Larkins, that she knew what it contained, and assigned reasons for not permitting it to be read. She did not say that she had ever heard it read, but only that she knew its contents. How she obtained this knowledge is no where disclosed. Whether it was derived from her

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son, the draftsman and beneficiary, or from some other purer and more reliable source, is not disclosed. The jury should have been told, that such information as that, would not be enough to establish the fact; and if she relied upon that alone for the knowledge she professed to have of the contents, it was not sufficient.

It is not contended that direct proof that the paper was read to her is necessary, but that the jury should have been instructed that the proof must satisfy them that such was the fact. Instead of this, the Court held, in effect, that the reading was not indispensable; provided, it appeared to their satisfaction that she had knowledge of the contents, no matter how acquired. Upon either view, the charge was imperfect on this point, if not erroneous. For if knowledge acquired by any means would do, the jury ought to have been carefully guarded against placing any reliance upon information obtained from the interested draftsman of the paper, as to the contents, and to have been admonished that the suspicious circumstances surrounding the case, enjoined it upon them to be most rigid in the investigation of the sources of her knowledge, and the satisfactory character of the mode by which it was obtained. Yet, as there is no request to thus extend and amplify the charge, we would not reverse upon that ground, where there is no positive error of law in the proposition announced.

But we think there is no inflexible rule of law, that the knowledge of the contents, which is required to be established in the case of persons who cannot read, or where the writer of the will gets a large benefit under it, can only be derived from hearing the will read, to be proved either by direct or circumstantial evidence;

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but all that is necessary is, that it must appear to the full and entire satisfaction of the jury, that the testator fully understood, and freely assented to the provisions of the will. This fact, as to the kind and description of proof, may be made out like any other disputed fact. But in a case of this description, the strength and conclusive character of it, must depend upon the degree of suspicion which the circumstances are calculated to excite, and it should be strong and convincing—equivalent at least, to the reading of the will, or hearing it correctly read. 1 Jar. on Wills, 44 to 47, and notes; 1 Williams on Ex'r. 18, 294; 7 Humph., 335; 4 Sneed, 88, *Cox vs. Cox*.

On the motion for a new trial, the affidavit of Arthur Click, and that of Horace Watterson, one of the contestants, were relied upon. Click states that in 1845 or 6, Henry Watterson told him that at the death of his mother, her negroes were to be divided, equally, between him and his brother, and said nothing about a will. Also, that then, or a short time before, Margaret Watterson told him she understood that her son Henry had a will giving him the negroes, and if he had, he made it himself, as she had never made such a will; and that she tried to get him, affiant, to draft a will for her, and said she had tried to get Richard Larkins and Jacob Miller to write a will for her. He further stated, that on the night before making his affidavit, he heard his mother, Rosanna Click, say that Margaret Watterson, for many years before her death, denied having made the will set up by Henry Watterson. This last, according to the affidavit of Horace Watterson, was newly discovered evidence. It might be important on the questions of her knowledge

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of, and assent to the provisions of the will set up. For the same purpose the testimony of Arthur Click would have been pertinent. What effect such proof would have, would be for the jury to consider. Arthur Click was under subpoena, as a witness for defendants, but when the case was taken up on Monday, it seems was not in attendance, but was at home on account of sickness in his family. Nothing was said about his absence, and no application was made for a continuance on that ground; but as soon as it was ascertained that he was not in attendance, a messenger was dispatched for him, and he arrived at the Court on the next day about dinner-time, when the opening counsel for the plaintiff had commenced his argument, but had not concluded it, when the Court was moved to allow him to be then examined. The motion was overruled, and the case progressed, and resulted in a verdict in favor of the will.

Upon these questions of practice, resting in the discretion of the Judge, it is a rule of this Court, not to reverse, except in very strong cases, such as rarely occur. Yet such cases may be presented, and we think this is one of them. It was a strong case for relaxing the rules for the attainment of justice. Every proper exertion to get the witness there in time, was made. The only fault was in not asking for a continuance on account of his absence, before the commencement of the trial. But it was perhaps better for both parties to save the delay, and try the case at the hazard, on the part of defendants, of failing to get the witness there at all. We can see no good reason for refusing to let the witness be examined at the time he was offered, under the circumstances made out; such would have been a proper

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exercise of the discretion of the Court for the attainment of justice.

It may be that neither of the grounds *alone*, would be sufficient to authorize a new trial in this case, but taking them all together, in view of the suspicions which crowd around the case, we feel it to be our duty to reverse the judgment, and remand the cause for another trial.

THE STATE v. GEORGE M. TOOLEY.

1. CRIMINAL LAW. *Peace warrant. Husband and wife.* A husband may demand sureties of the peace, in behalf of his wife, against any one from whom danger to her life or person may be justly apprehended, and may take the oath required for such purpose.
2. SAME. *Same. Same. Parent and child. Guardian and ward. Master and slave.* The individual occupying the relation of protector for those under disability, can lawfully demand sureties of the peace for such persons under disability, and make the necessary oath for that purpose; as the husband for the wife, the parent or guardian for infants of tender years or persons *non compos mentis*, the master for the slave, and in all other cases where the individual, whose life or person is in danger, is disqualified by law from taking the oath necessary to obtain the warrant, or from being prosecutor in the case.
3. SAME. *Same. Feme covert.* If sureties of the peace be demanded against a *feme covert*, she must find security by her friends. She cannot be bound herself, because incapable of binding herself by recognizance; and the same rule applies to infants.

FROM HAWKINS.

This was a peace warrant, obtained against the defendant upon the oath of C. J. Kounts, that he had

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good cause to fear, and did fear, that the defendant would kill or do some great bodily harm to the wife of said Kounts. At the January Term of the Circuit Court of Hawkins, Judge PATTERSON quashed the warrant, from which Attorney General POWELL appealed in error.

J. B. HEISKELL, for the State.

T. D. & R. ARNOLD and WILLIAM N. CLARKSON, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was a peace warrant, issued by a justice of the peace of Hawkins, against the defendant, on the complaint, made on oath, of C. J. Kounts, that he had just cause to fear, and did actually fear, that the defendant would kill his (Kounts') *wife*, or do her some great bodily harm, &c. The justice recognized the defendant to appear at the next term of the Circuit Court of Hawkins. In the Circuit Court a motion was entered to quash the warrant, which was made absolute, and the defendant discharged. From this judgment, the Attorney General prosecuted an appeal in error, on behalf of the State.

The ground for quashing the warrant, it is said, was, that the husband could not resort to this *preventive* remedy in behalf of his wife. And the argument has been repeated here, that the husband cannot demand surety of the peace against another for an apprehended danger to the person of his wife; that the remedy is

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personal to the *party in fear*, by whom the oath must be taken, and in whose name the proceeding must be instituted and conducted.

No authority, directly upon this question, has been adduced on either side. But, in view of the relation of husband and wife, and the nature and purpose of this peculiar remedy—which is not to redress, but merely to prevent the commission of offences—it seems to us that the judgment of the Circuit Court is clearly erroneous; if not, various classes of society will necessarily be excluded from the benefit and protection of this wise and humane principle of preventive justice. If the doctrine be correct, it must follow that married women, infants of very tender age, persons *non compos*, and those who are in the condition of slavery, cannot avail themselves of this remedy; because, incapable in law, of occupying the relation of prosecutor.

We have held, that a married woman cannot be prosecutor on an indictment for an injury to her person committed by a stranger; because not liable to a judgment for costs, should the prosecution prove to be frivolous or malicious: nor could she be held answerable in damages to the party injured, for the false imprisonment, or malicious prosecution. Upon the same grounds she is legally disqualified to prosecute a peace warrant. So, it is settled, that if surety of the peace is required *against a feme covert*, she ought to find security by her friends, and not to be bound herself, because incapable of binding herself by recognizance: and the same rule applies in the case of infants. See 4 Black. Com., 254.

It must be held, therefore, that the husband, who is bound to protect his wife, may demand surety of the

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peace in her behalf, against any one from whom danger to her life or person may be justly apprehended; and it follows, of course, that the oath to obtain the warrant may be taken by him, and the proceeding be conducted by him.

There is no great force in the objection that the husband cannot be presumed to know, and therefore cannot be allowed to swear as to the fear of the wife. He may, in many cases, possess actual knowledge on the subject, and be able safely to swear to the facts required to be established as the ground of this proceeding. But if not, the wife can be brought forward, on the examination in Court, as a witness, to make the proof; and, perhaps, in all cases it would be more satisfactory to require her to testify as to her own fears and grounds of apprehension. Keeping her back, if able to appear, might justly furnish strong ground of suspicion of combination. But if the wife be disabled from appearing, the case may be made out by the testimony of the husband, or other evidence showing a sufficient ground for demanding surety of the peace against the defendant.

And this doctrine must, of necessity, be applied to all the domestic relations, including that of master and slave, in cases where the person whose life or person is in danger, is disqualified by law, from taking the oath necessary to obtain the warrant, or from being prosecutor in the case.

The judgment will be reversed, and the defendant be remanded to the Circuit Court of Hawkins to answer the warrant.

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HUGH BLAIR *et al.* v. SAMUEL M. JOHNSTON *et al.*

PARTNERSHIP. *Liability of partners to each other for acts done for the benefit of the firm. Case in judgment.* Where three persons associated themselves together as a joint stock company to lay out and build a town, and two of them loaned a sum of money belonging to the company, in good faith for the benefit of the company, to aid in the erection of a certain manufactory, which, it was thought, would invite capital and labor to said town, and greatly promote its growth; but said manufacturing adventure proved a failure, whereby the sum of money so loaned was lost to the company, it is held that such loss was the loss of the company, and not alone of the two members thereof so making the loan.

FROM ROANE.

This bill was filed in the Chancery Court at Kingston, for the purposes stated in the opinion. At the October Term, 1857, Chancellor VAN DYKE gave a decree for the defendants. The complainants appealed.

BROWN, for the complainants.

ROWLES and LYON, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

This is a bill filed by the heirs and personal representatives of Wiley Blair, deceased. One of its objects is to charge James H. Johnston, Samuel M. Johnston, and Thomas H. Calloway, with the one-fifth of \$17,438 47, with interest on the same, since 1853.

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On the 3d of May, 1851, Wiley Blair agreed to sell and convey to the said Samuel M. Johnston and Thomas H. Calloway, four-fifths of the tract of land upon which the town of Loudon is now situated, including the ferry at that place, reserving in himself the other one-fifth.

On the same day, the said Wiley Blair, Samuel M. Johnston, and Thomas H. Calloway, associated themselves together under the firm name of Samuel M. Johnston & Co. The object of this association, as is shown in the bill and the record elsewhere, was to lay the said tract of land off into town lots, streets, &c., and to sell the same on speculation, and divide the proceeds among the parties, according to their interest. In other words, to establish and promote the growth of said town, with a view of profit by the sale of the lots. That Wiley Blair was a member of this company, is shown in the articles of association and other evidence in the record, and is not here controverted. There was a stipulation, that other stockholders might be admitted as members of the company, and others were admitted.

On the 5th of July, 1852, the said Wiley Blair, Samuel M. Johnston, and Thomas H. Calloway, constituted James H. Johnston their attorney in fact, and general agent to sell and convey lots, collect the money, manage the ferry, receive tolls, &c. Under this power, he had in his hands a large amount of the funds of the company.

In 1853, in order to enhance the value of the lots, and promote their sale, it became necessary, in the judgment of the company, to establish a rolling mill in the town; and one George Welch, a manufacturer, was

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invited to engage in the business. The company made him a donation of a lot, and agreed to, and did loan him the above named sum of \$17,438 17, to enable him to purchase and bring on the necessary machinery. This loan was made by the company through their agent, James H. Johnston, out of the funds in his hands; and no security was taken because the company retained the legal title to the lot upon which the mills were to be erected, and it was deemed ample security. The money was invested in the machinery and the mills built; but from some cause the enterprize failed, and the company were compelled to take back the lot with the mills upon it. And it is alleged, and the fact probably is so, that a part of the debt will be lost.

The Chancellor refused, and we think very properly, to charge Samuel M. Johnston, Thomas H. Calloway, or James H. Johnston, with this loss, and, correctly, held it should be borne by the company. It is not denied but that Samuel M. Johnston and Thomas H. Calloway, two of the members of the company, authorized the agent, James H. Johnston, to make the loan. But it is said, that so far as Wiley Blair is concerned, it was made without authority, and in opposition to his will. It is admitted that it was made in good faith, and to advance the interest of the company. Upon the facts stated in this record, it is exceedingly plain that complainants are entitled to no relief. It may be conceded that the power of attorney to James H. Johnston gave him no authority to make the loan, (Story on Agency, § 62,) yet the association of Samuel M. Johnston & Co. was in fact and in law a joint stock company—a co-partnership—and Samuel M. Johnston and

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Thomas H. Calloway had authority to loan this money, and to bind the other members of the firm. Story on Agency, § 37. The loan was for the benefit of all, and in their common business; and to hold that the two members who made it, or the agent who acted under their instructions, must now make good the loss to the company, would be at war with every principle of the law of partnership.

But if this were not so, we think the proof in the record sufficiently establishes that Wiley Blair, in his lifetime, actually gave his *assent* to this loan, and never, in any way, complained of what had been done by his co-partners. It is true, we think, that he did not own stock in the mills, and it is likely that none of the firm did; yet they were all interested in the success of the enterprize as partners. Blair lived in the town all the while until Welch failed, and the lot and mills had come back to the company, and yet remains wholly silent as to this transaction, large and important as it was to the interest of the firm. 2 Greenl. Ev. §§ 66 and 67.

It is said his mind was impaired by the excessive use of intoxicating liquors. This was no doubt so. But yet he is shown to have had prudence and caution in the management of his affairs, and, as we think, every way capable.

An attempt is made, in the record, to use his *declarations* to charge his co-partners with the loss, but these are inadmissible for any purpose.

There was no neglect, or want of care in the management of this fund by any of the defendants. We affirm the decree.

Benjamin G. Wilson v. Samuel E. McQueen.

BENJAMIN G. WILSON v. SAMUEL E. MCQUEEN.

1. PRACTICE AND PLEADING. *Replevin. Exemptions. Act of 1846, ch. 65.* The owner of a chattel exempt from execution under the poor laws of this State, may recover the same in an action of replevin when levied upon by the sheriff under a valid judgment and execution against said owner.
2. CASES CITED. *Shaddon vs. Knott*, 2 SWAN, 358; *Dearmon vs. Blackburn*, 1 SNEED, 390.

FROM JOHNSON.

This action of replevin is from the Circuit Court of Johnson county. At the March Term, 1858, before Judge PATTERSON, verdict and judgment were for the defendant. The plaintiff appealed in error.

A. D. SMITH, for the plaintiff.

LANDON C. HAYNES, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

The plaintiff, the head of a family, and a farmer engaged in agriculture, residing in Johnson county, owned the horse in controversy. This horse was used as a farm horse, and he owned no other horse, mule, or yoke of oxen. The defendant, who is the sheriff of that county, having in his hands a lawful execution against the plaintiff, founded upon a valid judgment in

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favor of Lewis Venable; levied the same upon this horse, and took it from the plaintiff's possession, though he, at the time, well knew it was his only horse.

The plaintiff, claiming that he was entitled to the ownership and use of this horse under the poor laws of the State, and that it was not liable to the seizure made under this execution; sued the defendant, in an action of replevin, to recover the horse. And the only question made in the record, is, whether the plaintiff is entitled to a remedy in this form of action? The Circuit Judge held he was not. But in this we think he erred. It has been decided by this Court that trover will lie in a case like this. *Hawkins vs. Pearce*, 11 Humph., 44. And it cannot be denied, but that either trover or detinue can be maintained. The levy is in violation of law, and vested no interest, or right whatever in the officer, or Venable, the creditor. The plaintiff, notwithstanding the levy, had the immediate right of property and possession in the horse. And in *Shaddon vs. Knott*, 2 Swan, 358, in putting a construction upon the act of 1846, ch. 65, it is held, that the action of replevin will lie in all cases where the plaintiff has a present right to the possession of any personal property in the possession of the defendant; and that this action is a substitute for the action of detinue, and is co-extensive with it in its application. Indeed the case of the plaintiff, in our view, comes directly within the words and meaning of the statute. The seizure and detention by the defendant were clearly in violation of the right of the plaintiff, and against his will.

No question is here sought to be made, as to the effect of the judgment and execution in favor of Ven-

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able. They are conclusive upon the plaintiff; and if the seizure had been of property subject to the levy, he could not, legally, have sued in any form of action. But this record presents a totally different case.

The case of *Dearmon vs. Blackburn*, 1 Sneed, 390, was correctly decided, but we do not regard it as an authority in this case. Its facts and the principles applicable to them, are widely different. There the sheriff, in seizing the property, did nothing but his duty, and what the law and the writ commanded him to do; and the cross-action of replevin was wholly unwarranted. But here the levy was prohibited, and the defendant a trespasser from the beginning.

Reverse the judgment, and remand the cause for a new trial.

CARUTHERS, J., dissents. I think the principle settled in the case of *Dearmon vs. Blackburn*, 1 Sneed, 392, is correct, and applies to this case so as to defeat the action.

JOHN T. KEYS v. JAMES J. RODER.

1. PRACTICE AND PLEADING. *Tender*. In an action of debt originating before a justice of the peace, a mere offer by the defendant to the plaintiff of the sum claimed, before the issuance of the warrant, cannot be pleaded as a valid tender in bar of the action. The money should have been produced and offered also, at the time of the trial before the justice; and upon appeal to the Circuit Court, it should be brought into Court at the time of the filing of the papers, and still

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held ready and produced, as a continuous offer. A mere offer of the amount to the plaintiff by the defendant's counsel, in the progress of the argument in the Circuit Court, would not be a valid tender, pleadable in defence of the action.

2. CASES CITED. *Keith vs. Smith*, 1 Swan, 92.

FROM SULLIVAN.

This action of debt is from the Circuit Court of Sullivan county. At the July Term, 1856, before Judge PATTERSON, verdict and judgment were for the plaintiff. The defendant appealed in error.

T. A. R. NELSON and FLETCHER, for the plaintiff in error.

T. D. and R. ARNOLD, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

In this case the Circuit Judge charged the jury, that the tender made before the issuance of the warrant would not avail the defendant, as a defence to the suit, unless it appeared in evidence that the money tendered was brought into Court by the defendant; and that the tender, by the counsel of the defendant in the progress of his argument, would have no effect in the case. And that to make the tender an available defence, the proper course would have been for the defendant to have brought into Court the sum tendered, at the time of the filing of the papers in the suit in Court. There is no error in this charge. In strictness, the money

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tendered should have been brought in with the papers on the trial before the justice of the peace. The general proposition maintained in the plea of tender is, that the defendant has done all that was in the power of any debtor alone to do, towards the fulfilment of his obligation; leaving nothing to be done towards its completion, but the act of acceptance on the part of the creditor.

If the tender was of money, it is pleaded with an averment that the defendant was always and still is ready to pay it, and the money is produced in Court. 2 Greenl. Ev., § 600; *Keith vs. Smith*, 1 Swan, 92. .

In the case now before us, nothing of this sort was done; but the defendant maintained his litigation with the plaintiff, not only before the justice, but in the Circuit Court, and brought in no money till it was offered to be done by his counsel in the closing argument in the case.

There is no error in the judgment, and we affirm it.

R. A. SAWYERS v. JOHN ZACHERY.

GUARDIAN AND WARD. *Verbal lease of infant's land. Trespass quare clausum fregit. Act of 1762, ch. 5, § 13.* A defendant, in an action of trespass quare clausum fregit, for injuries to the land of an infant, cannot defend himself on the ground that he was in possession of the land under a verbal lease from the guardian. A lease of an infant's

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lands, by the guardian, must be in writing, or it is a nullity. The provisions of the act of 1762, ch. 5, § 13, upon this subject, are imperative upon the guardian.

FROM KNOX.

This action of trespass *quare clausum fregit* is from the Circuit Court of Knox county. At the October Term, 1857, before Judge WELCKER, verdict and judgment were for the defendant. The plaintiff appealed in error.

MAYNARD and SAWYERS, for the plaintiff.

SCOTT and MYNATT, for the defendant.

McKINNEY, J, delivered the opinion of the Court.

This was an action of trespass *quare clausum fregit*, for an alleged trespass upon the lands of the plaintiff, who is a minor.

The facts are, that the defendant entered upon the land, under a *verbal* lease, for three years, from the former guardian of the plaintiff. And the question is, whether or not the defendant's entry and possession, under such lease, is a good defence to the action. His honor, the Circuit Judge, held that it was; and verdict and judgment were for the defendant.

The act of 1762, chap. 5, sec. 13, declares that "no guardian shall let or farm out any land belonging to any orphan for a longer term than the orphan be of age, or in any other manner than by lease in writing;

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and that special care be had that the tenant shall improve the plantation, and that he or she keep the houses, orchards, and fences thereon, or that shall be erected on the same, in good and sufficient repair, and leave the same so at the expiration of such lease; and that provision be made in such lease for preventing all kind of waste, and employing any timber to any other use than the immediate use of the plantation."

It is a general principle of law, that every contract prohibited by statute, is void. Within this principle, the verbal lease set up by the defendant, clearly falls. This being so, it is too plain to admit of discussion, that the defendant cannot justify or excuse the trespass under the color of a contract expressly interdicted by law.

Having entered and retained possession of the premises without any lawful authority, and by *implied* force, he stands upon the footing of a mere trespasser.

His honor erred in holding that the statute was merely directory to the guardian. We hold it to be imperative upon him. And the objects and policy of the statute are of too much importance to the community to admit of any relaxation in its construction.

Judgment reversed.

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MAYOR AND ALDERMEN OF MORRISTOWN v. GEORGE A.
SHELTON.

1. CONSTITUTIONAL LAW. *Town charters granted by the County Court. Const., art. 11, § 7. Acts of 1849, ch. 17, and 1856, ch. 254.* The act of 1849, ch. 17, authorizing the County Courts, upon certain conditions, to create town corporations, is a valid and constitutional enactment.
2. CASES CITED. *The State vs. Armstrong*, 3 Sneed, 634.

FROM GRAINGER.

This was an agreed case, submitted to the Circuit Court of Grainger, to test the validity of the charter of the town of Morristown, which was incorporated under the provisions of the act of 1849, ch. 17. The question arose upon a motion on behalf of the plaintiff to have certain real estate of the defendant condemned and sold for corporation taxes. At the August Term, 1858, Judge TURLEY disallowed the motion. The plaintiff appealed in error.

HEISKELL and McFARLAND, for the plaintiff.

SHIELDS, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

This case seems mainly intended to test the validity of the incorporation of Morristown. There is an agreed case presenting the facts.

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The question is made upon a motion to sell the land of defendant for the satisfaction of the tax assessed by the corporate authorities under the charter. The corporation was organized under the general act, for the incorporation of towns, of 1849, ch. 17. It is not controverted but that the proceedings in this case were in strict conformity to the provisions of that act, and the question is as to its constitutionality.

This statute establishes a general and complete system of municipal government for towns, cities, and villages, and provides, in the 9th section, the mode by which the inhabitants of any particular town may adopt and organize under it. They shall apply by petition, to the County Court setting forth their desire to avail themselves of its privileges, with a description by metes and bounds of the limits of their town, which shall be spread upon the minutes of the Court, and registered in the register's office. The objection taken is, that the power to grant charters of incorporation is vested alone in the Legislature, and cannot be delegated to the Courts, or any other authority. The clause in the Constitution on this subject, is the proviso to the 7th sec. of the 11th art., in these words: "*the Legislature shall have power to grant such charters of incorporation as they may deem expedient for the public good.*" This affirmative communication of this power to the Legislature operates as a negative upon its exercise by the Courts, or its delegation to any other authority. But then the question arises, has it been delegated by this act? We think very clearly not. The doubt upon this subject has, as it seems, grown out of a misconception of the case of *The State vs. Armstrong*, 3

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Sneed, 634. That case was correctly decided beyond all question. It was upon the act of 1856, ch. 254, by which the full and broad power to create corporations was given to the Circuit Courts, and was, therefore, held to be in violation of the Constitution. Not so in this act. It gives the County Court no power on the subject but to record the petition for the benefit of a perfect and complete charter, and designates the boundaries to which it is to apply—that is, to prescribe the corporate limits of their town. It cannot add to or diminish the powers, privileges, and immunities granted, nor make the least change of any kind in the charter. The legislative will is fully declared in the act, and nothing is left to the Court but to locate and apply it to any community who may petition for it, and bring themselves within its provisions. This is very different from the act of 1856, by which the extent and character of the powers given, and the particular objects of the corporation were to be fixed by the Court, or rather, in effect, the wishes and desires of the applicants in this respect ratified by the Court. That was as palpably in conflict with the Constitution, as this is in conformity to it. There is no discordance between this decision and that; the cases are entirely different.

The object of the Legislature was to save the great waste of time and money consumed in the making and printing separate acts for the incorporation of the thousand towns and villages that might and would spring up in this growing and prosperous State; and we may suppose that the importance, so far as practicable, of producing uniformity in the municipal powers

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and privileges of the citizens and corporate authorities of all the towns had its influence upon them. This would certainly be desirable, and is a strong consideration in favor of the policy of the act.

This act is nothing different in principle, in reference to this objection, than what is called the "free banking law;" and the constitutionality of that act has not, that we are aware, ever been questioned. If one is not obnoxious to the objection, the other is not. That was a single complete charter of incorporation that might be adopted by a thousand companies, and constitute them bodies corporate and politic for the purpose of banking, upon a compliance with its provisions. This was to be done by application to certain State officers, and the performance of the specified conditions.

Then, we hold, that the mayor and aldermen of Morristown had a right to exercise all the powers and to enjoy the privileges conferred by the act of 1849, among which was the power claimed in this case.

We therefore reverse the judgment of the Circuit Court, and sustain the motion of the plaintiffs.

JOHN CAMERON v. JACOB OTTINGER.

WARRANTY. *Of soundness in sale of slave. Evidence. Consideration. Merger.* In an action upon a verbal warranty of soundness in the sale of a slave it appeared, that after said sale, and after the death of the slave, the vendor had executed an instrument under seal to the vendee, reciting the previous sale, and verbal warranty of soundness, "that the same

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had not been reduced to writing, and that he now warrants said slave to have been sound at the time of said sale;" and it is held, that said instrument was not obligatory upon the vendor as a written warranty but was a mere recognition of the previous verbal warranty; that the original parol contract was not merged in the written instrument, and that the same was competent evidence to be considered by the jury in proof of said verbal warranty.

FROM COCKE.

This action of assumpsit is from the Circuit Court of Cocke county. At the April Term, 1858, before Judge PATTERSON, verdict and judgment were for the defendant. The plaintiff appealed in error.

A. J. FLETCHER and THORNBURG, for the plaintiff.

T. D. and R. ARNOLD, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

This was an action of assumpsit brought upon a verbal warranty of soundness of a negro girl slave. The slave was bought in October, 1854, and died on the 6th day of the next August. On the 13th of August, 1855, seven days after her death, the defendant executed and delivered to the plaintiff, at his request, this instrument:

"WHEREAS, I have heretofore, to-wit, in the month of October, 1854, sold to John Cameron, of New Port, a negro girl named Eliza, representing said girl to be sound in body and mind; and agreeing to warrant said girl to be sound as aforesaid; and whereas, said agreement has never been reduced to writing: now therefore, I,

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Jacob Ottinger, in compliance with said contract, do warrant that said girl was sound in body and mind at the time of said sale to said Cameron. Witness my hand and seal this 13th August, 1855.

JACOB OTTINGER." [L. s.]

"Attest:—T. S. GAMON, NOAH RENNER."

This writing was proved and read to the jury. It does not clearly appear whether Ottinger knew at the time that the negro was dead, but it is most likely from the proof that he did; but that would not, probably, affect the case any way. The suit was not brought upon this writing, but it was offered as evidence to prove the verbal warranty previously made. It is very clear that it is of no force or validity as an obligation, having been made after the contract, the death of the negro, and without consideration. The charge of the Court in relation to the effect of this instrument, was decisive of the case, and the jury rendered their verdict for defendant. The fact of the soundness of the slave at the time of the sale, was much contested in the proof, and made a difficult question of fact for the jury. But how they would or should have found that issue, we need give no opinion, as they were excluded from the consideration of it, or it was rendered unnecessary to consider of it, by the charge upon the other point.

His honor held, that the paper in question was a bill of sale with covenants of warranty, which might have been sued upon; that the same was a merger of the verbal warranty, and could not be received as evidence of the parol warranty, which was extinguished by it. The effect of the charge was, that the suit could not be

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maintained, because it was based upon the parol warranty, which had been extinguished by the writing under seal.

We are unable to concur in this view of the case. It seems to us to be entirely erroneous. It is a rare and strange instrument in its form. It is at first a written acknowledgment of a past transaction, that rested in parol, and then it assumes the form of a covenant of warranty, such as usually accompany and constitute a part of bills of sale. It does not purport to contain a contract of sale, that it recites had already transpired, and was not in writing. It is neither a bill of sale in form or substance, nor in any way, or for any purpose obligatory as such. No suit could be based upon it, nor did it create any new obligations upon the maker. It was only a written acknowledgment of obligations previously assumed, and upon which this suit is based. The form given to it and the formality of its execution, with seal and witnesses, or even the re-acknowledgment of the contract of warranty, which was before equally binding when proved, cannot change its nature and character. What is it at last, but a written recognition of a past verbal contract? It was proper to go to the jury as written evidence to establish the parol contract of warranty upon which the suit was brought; and it would be plenary proof on that point, and leave nothing more for the jury to decide, but the question of the soundness of the slave at the time of the sale with warranty.

For this error in the charge, we reverse the judgment and remand the case for a new trial.

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T. H. HOPKINS, ADM'R v. J. A. WHITESIDES *et al.*

1. CHANCERY JURISDICTION. *Contract. Corporation.* The Legislature granted to the complainant, a charter to build a turnpike road, which was forfeited by reason of non compliance with the terms thereof. After said forfeiture, the defendant obtained a charter to construct a road upon the road-bed indicated in the complainant's charter, subject to the condition that the complainant's work under the prior charter should be valued, and its value set apart to him in stock in the new company. Upon the organization of the new company, the complainant became a stockholder accordingly, but no money was paid on account of the new enterprise by any subscriber, and that charter was also forfeited. The complainant, thereupon, filed his bill to compel the new company to contribute and pay to him the amount and value of his work so converted into stock; and it is held that he cannot recover.
2. CASES CITED. *White vs. Campbell*, 5 Humph., 39.

FROM HAMILTON.

This bill was filed in Chancery at Harrison, for the purposes stated in the opinion. At the March Term, 1858, Chancellor VAN DYKE gave a decree for complainant. Defendants appealed.

TREWHITT, for the complainant.

MINNIS and WALKER, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

In 1846, the Legislature chartered the "Union Turnpike Company," near Chattanooga. By a previous act of

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1843, a charter was granted to Saml. B. Mead to construct a turnpike road over the same route, and after doing some work upon it, he forfeited the charter. By the tenth section of the act of 1846, provision was made for the valuation of the work done by him, and that a certificate for stock to that amount should be issued to him by the new company. This was done, and his work valued at \$1500. The last charter was also forfeited by lapse of the time authorized in the charter for the completion of the road. But the stock was taken under it, by the defendants and complainant, and subscriptions made in the names of fictitious persons, or in the name of real persons, without their authority. A meeting of the stockholders was had, and directors and president elected. But nothing more was done, and the enterprize again failed by lapse of time. No money was paid by the stockholders, and, perhaps, nothing done on the road. Mead was one of the directors elected.

This bill was filed by Mead to compel the other stockholders to contribute, in proportion to their stock, to make up to him the said sum of \$1500. The Chancellor gave the relief.

We are not aware of any principle upon which this decree can be sustained. His claim had been converted into stock by the express provisions of the tenth section of the act and his acquiescence therein by executing a receipt and receiving a certificate of stock; so he had no debt against the corporation, if it had even become a corporate body by the acceptance of the charter and proper organization under it; if he had, it was extinguished by the dissolution resulting from a

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forfeiture. 5 Humph., 39. In such a case, the debts due to and from the corporation, are all extinguished, without some provision in the charter, or some general law to prevent it.

But he makes his claim against the stockholders, as individuals, for contribution. If such a claim could be maintained in any case, it surely cannot in one like this. Mead performed no labor, and expended no money on any contract with this corporation, on the faith of the stock subscribed by others. The work done by him was under a previous charter to himself, and for his own benefit, and he could hold no one liable for it. It was lost by his own fault, in not complying with his charter. But the equitable provision was inserted in the new charter for his benefit, so far as to make him a stockholder, to the extent of his demand for work done. Upon the failure of the second charter, he was in no worse condition than before, and could have no legal or equitable demand against any one.

Nor is there any principle upon which he can be relieved, upon the ground that the new board of directors did not do their duty in going on with the road. He was one of the board, and as much in fault as the others, if the charter was lost by want of action on their part. If they failed to pay in their stock, there was a mode by which they could have been compelled, and for not adopting this mode, the complainant is no less in fault than the other directors. At all events, we can base no claim against them on account of anything he has paid under the new charter, for in that respect, he stands precisely upon the same footing with his new associates, none of them has paid anything, nor has he; his claim

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is not for work done on the faith of their subscription of stock, or upon any contract with them, but was against himself, as a defunct corporator, and only revived and made available against the new corporation in the particular mode prescribed by the statute of 1846. It was for his personal benefit, to afford him this new chance to save himself, and as it failed, he is in no worse condition than he was before. At all events, he has no claim against the defendants, which any Court can recognize.

The decree will be reversed, and the bill dismissed.

J. WILDE v. DANIEL J. RAWLINGS *et al.*

1. FRAUDULENT CONVEYANCES. *Deed of trust. Creditor and debtor.* A deed of trust, for the benefit of creditors conveying property, not sufficient to satisfy the debts, and which stipulates that the fund arising from the sale of the property conveyed is to be divided *pro rata* among the creditors; that all the creditors receiving such *pro rata* shall take it in absolute acquittance of their entire debts, or otherwise receive nothing; and that, in the event any portion of the creditors should not acquiesce in the terms of the conveyance, those who should so acquiesce should have their debts paid in full, and the balance, if any, should be paid to the bargainor, is absolutely void upon its face, and of no effect.
2. CASES CITED. *Gimell et al. v. Adams et al.*, 11 Humph., 283.

FROM HAMILTON.

This cause is from the Chancery Court of Chatta-

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nooga. At the July Term, 1858, Chancellor VAN DYKE dismissed the bill. The complainant appealed.

HOPKINS, for the complainant.

WELCKER and KEY, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The complainant, who is creditor of the defendant Rawlings, seeks, by this bill, to have satisfaction of his debt out of the proceeds of certain property conveyed by the defendant, in trust, on the ground that the conveyance is fraudulent.

The defendant, Rawlings, being largely indebted to different persons, on the 30th of May, 1857, made an assignment of his mercantile effects and other personal property, to the defendant Stark, for the benefit of the creditors therein named, including the complainant.

The deed provides, that the several creditors named therein, "shall be entitled to their *pro rata* part of this assignment, provided they will make their election (on receiving notice of this assignment) to accept their *pro rata* part of said proceeds, in full discharge of their said debts, respectively; but not otherwise." Four months are allowed, within which, the creditors named may elect whether to accept or refuse the terms of the assignment; and the "assignment is to be closed out in twelve months," if practicable. The deed further provides, that in the event "only a part of my said creditors elect to relinquish their said claims on me, and take the *pro rata*, then and in that case, those

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accepting the terms of the assignment shall be entitled to a full distribution of the whole proceeds, *pro rata*, among them." And, in conclusion, it is further provided, that "should there be more than enough to fully pay off all the debts of those who accept this assignment, *the surplus is to be paid to me.*"

The proceeds of the trust property are not sufficient, perhaps, to pay one-fourth of the debts specified in the deed.

The complainant refused to assent to the terms of the assignment, and insists that he is entitled to full satisfaction of his debt, regardless thereof, on the ground that it is fraudulent, in law, upon its face.

The authorities, upon this general subject, present a most remarkable diversity and contrariety of judicial opinion, in the Courts of the different States.

According to some of the cases, an assignment stipulating for a release, on the unqualified condition of excluding the non-releasing creditor from all benefit under the assignment, would seem to be considered valid. In other cases it is held, that where the stipulation for a release is only made a condition of preference, postponing thereby the non-releasing creditors to those who release, the assignment is valid. And other cases hold that all such stipulations are in violation of the just rights of creditors, and therefore void.

The course of decision with us, has been in accordance with the latter cases.

By the terms of the deed before us, all creditors who do not agree to accept a *pro rata* share of the fund created by the deed, *in full discharge of their debts*, are absolutely excluded from all benefit under the

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assignment. And, by the express provision of the instrument, if the fund should turn out to be more than sufficient for the discharge of the claims of the creditors who may accept the terms, the surplus is to be appropriated, not for the benefit of other creditors, but *is to be paid to the debtor.*

This is an attempt to exert a power over creditors not sanctioned by our law. The debtor, even under the *insolvent laws*, after the surrender of his property for the benefit of his creditors, could not claim to be discharged from payment of any portion of the debt that might remain unsatisfied. By our law, nothing can exonerate the debtor from the obligation to pay the full amount of his just debts, but the voluntary release of the creditor. And, of course, the attempt to coerce a release, by making it a condition of the deed, that the refusal to release shall operate as a forfeiture of any benefit under the assignment, can be of no avail, except to destroy the deed. Such a stipulation is regarded, in law, as furnishing conclusive evidence of an intent "to hinder, delay and defraud creditors of their just and lawful debts."

Of like character is the other provision of the deed, reserving any surplus of the fund to the debtor's own benefit.

For these reasons the assignment must be declared void; and the complainant will be entitled to satisfaction of his debt out of the fund. See 11 Humph., 283.

Decree reversed.

John Gilliam v. The State.

JOHN GILLIAM v. THE STATE.

1. WITNESS. *How impeached.* In impeaching the credibility of a witness under our practice, the inquiry is not restricted to the general reputation of the witness for veracity, but it involves his whole moral character. The impeaching witness should, therefore, be asked whether he knows the general reputation of the person whose credibility is in question; what that reputation is, and whether, from such knowledge, the witness would believe him on oath.
2. CASES CITED. *Ford v. Ford*, 7 Humph., 92.

FROM MARION.

The prisoner was indicted and convicted before Judge GAUT, in the Circuit Court of Marion, of the offence of placing obstructions upon a railroad. He was sentenced to the penitentiary, and, to reverse the judgment, he appealed in error.

HYDE, FRAZIER, and TURNEY, for the prisoner.

HEISKELL, REESE, and MINNIS, for the State.

McKINNEY, J., delivered the opinion of the Court.

The plaintiff in error was convicted in the Circuit Court of Marion, under the act of 1852, for placing obstructions on the track of the Nashville and Chattanooga Railroad, and was sentenced to four years imprisonment in the penitentiary. To reverse which judgment, he has prosecuted an appeal in error to this Court.

In the progress of the trial, it was attempted, on the part of the defendant, to discredit a witness for the

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State. The Court ruled, that in doing so, "the impeaching witnesses must confine themselves to his general reputation as to the trait in question—that is, for truth." In this, it is said the Court erred.

There seems to be some diversity of opinion upon this point, in the American Courts. In some of the States, the inquiry is restricted to the general reputation of the witness *for veracity*, and in others, the inquiry involves the whole moral character of the witness. The latter practice has received the uniform sanction of this Court. It has been regarded as essential to the ends of justice, that both the Court and jury should have full opportunity of knowing the entire moral character of the witness, where credit is sought to be impeached; in view of all which, it may safely be left to the jury to determine what degree of credit the witness is entitled to for truth, notwithstanding his other vices and immoralities of character, as his claims to veracity is the primary and important consideration.

There is, perhaps, scarcely less diversity of practice in regard to the questions to be put to the impeaching witness.

According to our practice, the proper inquiries are, whether the witness knows the general reputation of the person whose credibility is in question; what that reputation is; and whether, from such knowledge, the witness would believe him upon his oath. See *Ford v. Ford*, 7 Humph., 92, 101; 1 Greenleaf's Ev., sec. 461, and notes.

In this view, the Circuit Court erred in restricting the inquiry into the general reputation of the witness. And for this error, the judgment must be reversed.

Thomas H. Fancher v. Alphonze DeMontegre.

THOMAS H. FANCHER v. ALPHONZE DEMONTEGRE.

1. JUDICIAL KNOWLEDGE. *Registers.* The Courts of this State will judicially know the registers of the several counties of this State.
2. EVIDENCE. *In description of land in a deed. Of mistake in recital of number of grant.* Where there is a mistake in the recital of the number of a grant in a deed, and the land is otherwise sufficiently identified and described, such mistake is immaterial.
3. POSSESSION. *Of mixed possession.* Where the possession of land, slaves, or other property, is joint or mixed, the law adjudges the possession to be with him who has the superior title. This general rule applies as strongly in favor of the children and other members of the father's family, as of strangers. If they actually reside with the father upon the property, it can make no difference, that he is the head of the family; claims the estate for himself and in his own right, and apparently controls it; if he have not the title, and it be in his children, the law fixes the possession with them.

FROM BLEDSOE.

This action of ejectment is from the Circuit Court of Bledsoe county. At the July Term, 1856, before Judge GAUT, verdict and judgment were for the plaintiff. The defendant appealed in error.

MINNIS and NELSON, for the plaintiff in error.

FRAZIER and HYDE, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

1. The objection to the Register's certificate upon the deed from Duguide and Curtis, to the plaintiff be-

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low, has nothing in it. The Courts will take judicial notice of the registers of counties. Mr. Greenleaf (1 Green. Ev., § 6) says, Courts will take notice of marshals and sheriffs, and the genuineness of their signatures.

2. The next objection, is, to the description of the land in this deed; that it is described as grant, No. 4795, to John Roberts, when it appears to be grant No. 4794, to Thomas B. Eastland; and so that no title passed. But we think this position also untenable; because the land is, in other respects, sufficiently identified and described. The entry was in the name of John Roberts, and the true number of the grant, no doubt, is 4795. 4 Comyn's Dig. Title Grant, (G. 5.)

3. The Court was asked by Fancher's counsel, to charge the jury, that if Elijah Frost was in the possession of the disputed land, and his son, Thomas Frost, was living with him, the law adjudged the possession to be with the legal title. This, the Court refused to do. But instructed the jury to look to the proof, and if they were satisfied that Elijah Frost, the father, was in possession in his own right, and claiming for himself, and his son Thomas was living with him, as one of the family, then the possession was that of the old man, and not that of Thomas; and if, after the old man left, Thomas took possession, and sold to, or put defendant in the possession, he cannot couple the possession of the old man, without color of title, with that of Thomas, to make out the seven years actual adverse possession. Nor would the possession of the old man, in his own right, or for himself, be the possession of Thomas, who

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was living in the family, and as one of the children of old man Frost.

In this part of the charge, there is a material error. It is well settled, that in the case of a mixed, or joint possession of land, slaves, or other estate, the law adjudges the possession to be with him who has the superior title. And this rule applies, as strongly in favor of the children, and other members of the father's family, as of strangers. And if they actually reside with him upon the property, it can make no difference that he is the head of the family, claims the estate for himself, and in his own right, and apparently controls it. If he have not the title, and it be in his children, the law fixes the possession with them. Wheeler on Slavery, 90, and authorities cited: 4 Wheat., 213; 3 Mass., 215; 10 do., 146; *Brimmer vs. Long Wharf*, 5 Pick., 131. In this case, Thomas Frost had a grant from the State of Tennessee, dated in 1846, which embraced the land in dispute; and under which, it is proved, he had claimed it for more than nine years; and during this time he and his father actually resided together upon it. It is said, the old man Frost owned two hundred acres, embracing the land in dispute; but no title in him is shown, and there is no proof of it; and this two hundred acres is embraced within the grant of six hundred and forty acres to Thomas Frost.

It is true, that one witness does speak of a conversation between defendant in error and Thomas Frost, in which the latter admitted his title to one-half or three-fourths of an acre of the land in dispute, and said he would not plead the statute of limitations, etc., but it does not appear when this was; and the other evidence

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in the cause shows, clearly, that he had possession of it, and claimed it under the six hundred and forty acre grant. Fancher claims under Thomas Frost; and it is most probable, from an examination of the facts in this record, that the charge of the Court did most materially prejudice his defence. How the facts may appear, upon another trial, we cannot say. For this error in the charge, we are constrained to reverse the judgment. Judgment reversed, and cause remanded for another trial.

ROBERT SLOAN v. A. V. HANNAH.

ROADS. *Of the appointment of overseers, and allotment of hands. County Court. Act of 1835, ch. 6, § 2.* The classification of public roads in this State, and the allotment of hands to overseers, cannot be done by a less number than twelve, or one-third of the Justices of the County Court. The mere appointment of overseers is a very different duty, and may be done by the Quorum Court or the County Judge.

FROM POLK.

This action of debt was commenced before a justice of the peace of Polk county, by Hannah, as overseer of a public road, against Sloan, to recover the amount fixed by statute for failing to work upon the road. In the Circuit Court of said county, before Judge GAUT, ver-

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dict and judgment were against the defendant, from which he appealed in error.

TREWHITT, for the plaintiff in error.

———, for the defendant in error.

MCKINNEY, J., delivered the opinion of the Court.

This suit was commenced before a justice of the peace of Polk county. It was brought to recover from Sloan the sum prescribed by the statute, for his failure to work on a public road in said county, of which Hannah was the overseer. It is admitted, that Sloan was duly notified to work on the road; and the question for our determination is, whether or not Hannah had any lawful authority to require him to work on said road.

It appears, that, at a session of the County Court of said county, in the year 1856, the County Judge being alone on the bench, holding said Court,—it was ordered by the Court: "That A. V. Hannah be appointed overseer of a road, from Wm. Fagg's shop to the widow White's ford, on the Ocoee river; and that he have all the hands in the third district; so as to make said road as required by law, a road of the first class."

On appeal to the Circuit Court, the plaintiff recovered for the failure of Sloan to work three days.

The error in the judgment relied upon is, the instruction of the Circuit Judge to the jury, that the County Judge had authority to make the foregoing order.

This instruction assumes, that the power of the *Quorum Court* to "appoint overseers of roads," under the

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act of 1835, ch. 6, sec. 2, carried with it, by implication, the power to assign hands to the overseers, thus appointed; and also to classify the public roads of the county; and that like power must, of course, be held to belong to the County Judge.

This is a mistaken assumption. The allotment of hands to each overseer, as well as the classification of the roads, is a power which, for obvious reasons, has never been entrusted to a less number than twelve, or one-third of the justices of the County Court. The simple appointment of an overseer, is a duty of a very different nature; and it carries with it no such power as was supposed by the Circuit Judge.

It follows, that the present suit cannot be maintained.
Judgment reversed.

CROMWELL DELOZIER v. THE STATE.

WITNESS. *Criminal law. Practice.* Where two or more are jointly indicted, and separately tried, it seems that, after trial of one of the parties, and before judgment upon a verdict against him, he may be examined as a witness on behalf of his co-defendants. But, in all such cases, it is the better practice for the Court to render judgment immediately upon the verdict; and in a case where, after verdict against one, the Court would not allow him to be examined for the other, because judgment had not been pronounced upon the verdict, it is held to be an error upon which the latter defendant could claim a new trial.

FROM SEVIER.

The plaintiff in error appeals from a judgment of the

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Circuit Court of Sevier county, Judge TURLEY presiding,
upon a conviction of assault and battery.

J. P. SWANN, for the plaintiff in error.

HEISKELL and REESE, for the State.

McKINNEY, J., delivered the opinion of the Court.

The plaintiff in error, and his brother, Andrew Delozier, were jointly indicted for an assault. They severed on trial. Andrew was first tried and found guilty. On the trial of the present defendant, Cromwell Delozier, it was proposed, in his behalf, to introduce Andrew as a witness. The Court refused to allow this to be done, upon the ground that judgment had not been rendered on the verdict against him.

Although there is some conflict of authority upon the point, it is difficult, in principle, to perceive any sound reason why, in a case like the present, one of several defendants jointly indicted, but tried separately, should be held incompetent as a witness, either before or after trial and conviction, for a co-defendant. His relation to the case, or the party on trial, may justly affect his *credibility*, more or less, according to the circumstances of the particular case. But we are at a loss to see any just ground upon which he should be excluded as positively *incompetent*. But, be this as it may, it is very clear, that it will not do to place it in the power of the Court, by a mere suspension of judgment upon the verdict, without any sufficient cause, to hold the party convicted, in a condition which disqualifies

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him to give evidence for a co-defendant, even if the law were as it seems to have been assumed to be by the Circuit Judge. Upon that hypothesis, the Court ought to have at once rendered judgment, so as to remove the supposed disability.

On this ground alone the judgment must be reversed.

FRENCH AND VAN EPPS v. BRANDON AND KEINBRUSCH.

EVIDENCE. *Book debt law. Act of 1756, ch.* An account for goods, wares, and merchandise, delivered to be *sold on commission*, cannot be proven by the plaintiff's own oath under the book debt law.

FROM MORGAN.

This action of debt is from the Circuit Court of Morgan county. At the November Term, 1857, before Judge TURLEY, verdict and judgment were for the defendants. The plaintiffs appealed in error.

HUMES, for the plaintiffs.

MAYNARD, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

There must be a new trial in this case. It was erroneous to permit the defendants to prove the account

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offered as a set-off, under the book debt law. The account is for articles delivered to the plaintiffs to sell on commission, and not for goods *sold* and delivered. The act of 1756 only applies to the latter case, and does not embrace the former. There is no other proof of the adverse account.

The defendants filed a bill for discovery, under the act of Assembly on that subject, in relation to these dealings, and the state of accounts between the parties. The interrogatories were fully answered, and the same was read in evidence by the defendants. By this proceeding the plaintiffs were made witnesses, and their statements must be taken as true, so far as they are responsive to the interrogatories propounded; and the burden of disproving them is thrown upon the defendants. This is not done, except by the affidavit of defendants to their account, and this, we have seen, is inadmissible.

The suit is brought upon a note for \$115.80. The credits admitted in the answer to the bill of discovery, are about \$80. No other credits are proved, and still the judgment is in favor of defendants, on their plea of set-off, for \$37.50.

The judgment must be reversed.

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JOHN (A SLAVE) v. THE STATE.

CRIMINAL LAW. *Continuance. Act of 1827, ch. 80, § 2.* The act of 1827, ch. 80, authorizing a continuance at the first term upon the affidavit of the prisoner, that he cannot go safely to trial on account of popular prejudice against him, should receive a liberal exposition in favor of human life. Thus, a prisoner indicted for a capital felony was not arraigned at the term at which the indictment was found, for the want of time; and at the succeeding term, upon his arraignment, he asked a continuance under the provisions of the act of 1827, ch. 80, § 2, which was refused him. This is held to be error. The "first term" in the sense of the statute, means the term at which the prisoner is arraigned for trial; and it is then that such an affidavit of itself, entitles him to a continuance.

FROM GRAINGER.

The prisoner, a slave, was indicted in the Circuit Court of Grainger county, for murder. At the April Term, 1858, before Judge TURLEY, he was tried, convicted, and condemned to suffer death. He appealed in error to this Court.

J. B. HEISKELL, for the prisoner.

W. B. REESE, Jr., for the State.

MCKINNEY, J., delivered the opinion of the Court.

The plaintiff in error was indicted in the Circuit Court of Grainger, for the murder of a female slave, the wife of the prisoner. He was found guilty, and sen-

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tenced to be hung. The case is brought up by an appeal in error; and the error assigned is, the refusal of the Court to grant a continuance of the case.

It appears from the record, that the indictment was found at the December Term, 1857, just before the close of the term; and after the traverse jury had been discharged, and all the other business of the Court had been continued over to the next term; in consequence of which, the prisoner was not arraigned on the indictment until the following April Term. At the April Term, upon being charged on the bill of indictment, the prisoner presented his affidavit under the act of 1827, ch. 30, sec. 2, asking a continuance, on the ground of the great excitement in the public mind to his prejudice. But the application was refused, and he was put upon his trial.

The act referred to, provides, that if the defendant in a criminal case, in which a change of venue is not allowed by law, "will make oath that there exists too great an excitement to" (his) "prejudice, to come to trial at the *first* term, it shall be a sufficient cause for a continuance for one term only."

It is said the continuance was refused on the ground, that, as the prisoner was not put upon trial until the next, or second term after the indictment was found, he had, in fact, had all the benefit of the delay contemplated by the statute; and, therefore, the reason of the law had ceased to apply, and the case was not within the statute.

This construction is wholly inadmissible. In favor of life, the statute is to receive a liberal exposition; such is the uniform principle. The construction contended for,

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and adopted by his honor, the Circuit Judge, is directly in the face of the plain words, as well as the spirit of the act. The act explicitly declares, that upon oath being made as therein prescribed, "*it shall be a sufficient cause for a continuance for one term.*" And it is not for the Court, either to say that it shall *not* be a sufficient cause, or to gainsay the truth of the statement verified by the defendant's oath.

It is clear, that, by the words "first term," was meant the term at which the prosecuting officer of the government demands the arraignment and trial of the defendant.

On this ground, the judgment must be reversed, and the prisoner be remanded for a new trial.

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1. **CONVERSION.** *Waiver.* The question, whether or not a conversion of property is waived, is a question of intention. It is a mixed question of law and fact, to be submitted to the jury under proper instructions from the Court. It must, in all cases, appear that the party had full knowledge of his rights, in respect to the matter of which the waiver is predicated, for if ignorant thereof, of course no intention to waive anything can be implied.

NAME. *Same.* *Case in judgment.* The plaintiff hired her slave to the defendant, by express contract, to be employed in a particular service. The defendant sub-hired the slave to be employed in a totally different service, and pending said latter service, the slave was taken violently ill; and, at the suggestion of the physician, he was taken to the house of plaintiff to be nursed, where he died. It is held, that the mere fact of the plaintiff's receiving the slave, under the cir-

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circumstances, was not of itself, a waiver of the conversion; but it depended upon the motive with which it was done, which was matter to be considered by the jury.

3. CASES CITED. *Bell v. Cummings*, 3 Sneed, 275.

FROM BRADLEY.

This action on the case is from the Circuit Court of Bradley county. At the September Term, 1858, before Judge GAUT, verdict and judgment were for the defendant. The plaintiff appealed in error.

ROWLES, for the plaintiff.

HOYLE and EDWARDS, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an action on the case to recover damages for the alleged conversion of a slave, hired by the plaintiff to the defendant for twelve months.

The declaration contains counts in trover and case. Upon the issue of not guilty, the jury found for the defendant; and, a new trial being refused, the plaintiff appealed in error.

The defendant kept a public hotel, and the slave was hired to him on the 10th of March, 1856, upon an express agreement that he was to be employed as a servant in the hotel. About the 1st of May, the defendant *sub-hired* the boy to the Messrs. Cowan, to work in a brick-yard—a sort of employment, which the defendant was

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informed, at the time of hiring, the plaintiff would not suffer him to be engaged in. In the month of June, while at work in the brick-yard, the boy was taken ill with a violent dysentery, of which he died in a few days. A physician was called in by Cowan, to visit the boy. The physician, soon afterwards, "saw the plaintiff and suggested to her that she had better have the boy brought to her house, where she could have him attended," and he was accordingly taken to her house from Cowan's, where he died in a short time after his removal. The physician proves that the boy was well attended to at Cowan's; but it was his opinion that he would do better with the plaintiff; and it was at his (the physician's) suggestion the negro was brought there.

The principal question on the trial, was, whether or not the act of the plaintiff, in receiving back the slave, under the circumstances, was a *waiver* of the conversion. Upon this point, his honor, the Circuit Judge, instructed the jury, that, "although the defendant was guilty of a wrongful conversion of the slave, and liable to be sued in trover for his value; still, if the plaintiff received the negro back into her possession, and treated him as her property, before his death, that it was a *waiver* of her right to sue in trover, for the conversion."

This instruction, in the general and unqualified terms in which it is stated; is, we think, exceptionable.

The question of waiver, is mainly a question of intention. The mere isolated act of receiving back the slave, is, in itself, equivocal. From this simple fact, it cannot be assumed, as a conclusion of law, that the plaintiff, in the case before us, waived the tortious conversion of the slave. In this lies the error of the

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instruction; for the Court does assume, as a matter of law, that, upon the facts proved, there was an absolute waiver of the tort.

Whether or not the reception of the slave, under the circumstances of this particular case, amounted to a waiver of the conversion, depends upon the intention or motive which prompted the act. And the motive or intention of the act in this case, as in most other instances, is matter of inference, to be deduced with more or less certainty from the external and visible acts and conduct of the party; and all the accompanying circumstances of the particular transaction. If the owner, with knowledge of the facts which, in law, constitute the conversion, take back the slave into his possession *as owner*, (either at the expiration of the term of hiring, or before,) and as if the tort had not been committed; *this* will be evidence of a waiver of the conversion; and being once waived, the right to sue in trover, for the tort, is gone forever. This is the doctrine of the case of *Bell v. Cummings*, 3 Sneed, 275. Which, on review, we fully approve. It must be clearly established, however, that the party had full knowledge of his rights, in respect to the matter of which the waiver is predicated; for, if ignorant thereof, of course no intention to waive anything can be implied. But if, as is assumed for the plaintiff to be the fact in the present case, the slave was received back, not with any intention to waive the tort, or to forego any legal rights resulting therefrom, but purely from motives and feelings of humanity towards the slave, or in obedience to the wishes of the physician, or from considerations of personal kindness towards the *new* owner of the slave; or

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other such like motive; then, the simple act of taking back the slave, under such circumstances, would not, of itself, be sufficient evidence of a waiver of the conversion. And it may be observed, that the question, what amounts to a waiver, is, in all cases, a mixed question of law and fact, to be determined by the jury, under proper instructions from the Court.

But, though the technical conversion be waived, impliedly; still, the same result, in favor of the owner, may, frequently, be substantially attained on the count *in case*. The only material difference between *trover* and *case*, is, in respect to the rule of damages peculiar to each action. In *trover*, upon the fact of conversion alone, the value of the property is recoverable as a matter of course; whereas, in *case*, the damages are measured by the nature and extent of the injury, and the value, or a less amount, may be allowed by the jury, according to the intrinsic merits of each particular case.

It results, from this view of the law applicable to the case, that the instruction to the jury was erroneous. The Court likewise erred in not rejecting the statement of Cowan, derived from his negroes, in regard to the slave Nathan having been at Tucker's on the Sunday before he was taken sick. This was excepted to when stated; and the Court, instead of passing it silently by, should have excluded it from the jury.

Judgment reversed.

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JARED H. GRAHAM v. RIDLEY ROBERTS AND MARTHA WRIGHT.

1. **PROCESS.** *Service of.* Counterpart of a summons was issued against Garret H. Graham, administrator of John Graham, deceased. The sheriff executed said writ on Jared H. Graham, administrator of John Graham, deceased, and made due return thereof. The latter was the *real* party, but his name was not properly given in the writ. Held, that this was a valid service of the summons on Jared H. Graham, and he was guilty of gross negligence in not, at once, making his defence, if he had any.
2. **SAME.** *Same. Waiver.* The sheriff stated to the defendant that he knew no such man as Garret H. Graham; and when asked by Jared H. what he intended to do, he replied that he should return the summons with the *facts* upon it. Jared H. Graham was at Court. Under the advice of counsel he failed to make defence, and judgment by default was taken against him. He was fully apprised of the judgment by default before final judgment—appeared and defended the case upon the trial, at the execution of the writ of enquiry—introduced evidence—made various motions in the case, and filed a bill of exceptions. He failed to have the judgment by default set aside. This was a waiver of the service of process, if not served, and he could not thereafter be heard to say that it was not executed on him.
3. **SAME.** *Judgment by default set aside for want of service of process.* If judgment by default is taken against a party without service of process, the Court has power and will set aside such judgment, upon a proper application made by such party.
4. **CHANCERY.** *Jurisdiction. Remedy at law.* If a person has a perfect remedy at law, of which he is not deprived by fraud, or accident, or the act of the opposite party, a Court of Chancery cannot grant him relief.

FROM MARION.

Trial before VAN DYKE, Chancellor, at the December Term, 1858. The bill was dismissed, and the complainant appealed.

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TURNEY, for the complainant.

FRAZIER, and HYDE, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

In the year 1849, Martha Wright sued Ridley Roberts and complainant, Jared H. Graham, as the administrator of John Graham, deceased, in the Circuit Court of Jackson county, Tennessee, in covenant. The writ was issued the 5th of July, 1849, and the original placed in the hands of the sheriff of Jackson county, and by him returned, on the same day, executed. A counterpart was issued and placed in the hands of the sheriff of Marion county, where, it seems, complainant lived, and was, by him, returned executed on complainant, on the 20th of July, of the same year. The complainant was described in the writ as, "Garret H. Graham, administrator of John Graham, deceased"—his true name being Jared H. Graham.

When the sheriff of Marion county received the writ—believing complainant to be the person intended, and not knowing of any other Graham, who could answer to the description of administrator of John Graham—he executed it upon him, and returned the *fact* that he had executed it upon "Jared H. Graham. When he showed the writ to complainant, at the time he served it, he remarked, "he knew no such man as Garret H. Graham;" and the sheriff responded that he knew no such man himself, and that if the addition of administrator had not been to the writ, he would not have supposed complainant to be the person meant.

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Before they separated, complainant inquired of the sheriff what he was going to do about it, and he replied, that he should return it, with the *facts* upon it, but did not tell him he should return it executed upon him, Jared H. Graham.

At the return term of the Circuit Court, in November, the complainant and Roberts having failed to plead, judgment, by default, was taken against them, and a writ of enquiry of damages awarded to the next March Term of the Court, when a judgment final was taken; and this judgment, on appeal, was affirmed in the Supreme Court—at least a judgment was there had for \$625.25, and costs; and complainant has, since, by a subsequent proceeding, been rendered personally liable for said judgment, at the suit of Martha Wright.

The object of the present bill is to enjoin these judgments, upon the ground that complainant was never served with process, and of newly-discovered evidence.

The Chancellor gave a decree dismissing the bill, and, we think, very properly.

The complainant is not entitled to relief upon several grounds. In the first place, the defendant, in her answer, asserts that she was informed, and believed, that complainant was present in Court when the judgment by default was taken, and failed to make defence by the advice of his counsel. This view of the case is strongly supported by the testimony of H. J. Graham and Wesley T. Burnett—two of complainant's witnesses—who prove that he left home and went to Jackson county, Tennessee, in October, 1849. The Court sat the 1st Monday in November, and he is shown to have lived about 110 miles from that county. And we can

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hardly imagine why he should have gone there at that time, under the circumstances, unless it were to look after the defence of the suit.

But if this were not so, the bill and the record shows that complainant became fully acquainted with the pendency of the suit and the judgment by default, before the next term of the Court, and before final judgment, and actually appeared and defended the case, upon the trial at the execution of the writ of enquiry—submitted evidence to the jury—made various motions in the case—filed a bill of exceptions, and appealed; but yet he failed to have the judgment by default set aside, or to make any proper attempt to do so. This, he should have done, if, in fact, the writ had not been executed upon him. And we cannot doubt, if he had shown this fact, he would have met with instant relief, at the hands of the Circuit Court—or that failing there, upon a proper case, the Supreme Court would have reinstated the cause. That the Circuit Court had this power, was decided by this Court, in *The Bank of Tennessee v. Spillern and Merriwether*, 2 Sneed, 698.

Complainant had a perfect remedy in the Circuit Court, of which he was not deprived by fraud, or accident, or the act of the opposite party, and equity cannot relieve him. 7 Hum., 39.

But if this were not so, and conceding that he was not served with process by the sheriff of Jackson county, yet the service upon him by the sheriff of Marion, was, in all respects, valid, and he was guilty of gross negligence in not, at once, making his defence, if he had any. This case cannot be sustained by *Rice v. R. R.*

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Bank, 7 Hum., 39, and *Ridgeway v. The Bank of Tennessee*, 11 Hum., 523. The cases are wholly unlike.

The claim to relief upon the ground of newly-discovered evidence, has nothing in it, because the *fact relied on* was well known to Ridley Roberts—complainant's principal in the covenant—and it was gross negligence in him not to have known it. Besides, the *fact* could do complainant no good as a defence. The *sale* of the slave by Roberts was, of itself, a breach of the covenant, and the merits of the case are with the defendant.

We affirm the Chancellor's decree.

JOHN MAYSE v. JOHN AND JAMES LAFFERTY.

1. EVIDENCE. *Plat annexed. Marked boundary will control.* A plat annexed to a partition, or grant, is competent evidence to be looked to in ascertaining the true boundary of the land set apart; but the party is entitled to the lands actually appropriated, and if the land has been actually surveyed, and the lines marked different from the plat, the marked boundary will control.
2. BOUNDARY. *Statute of limitations. Act of 1819, § 1.* If, at the time of the execution of a deed, the lines are marked, and the boundary thus made varies from the lines of the previous conveyances under which the bargainor claims title; and the lines marked are known and recognized by the parties as the true boundary of the land, an adverse possession of such land for a period of seven years, claiming up to the new boundary thus made, will vest an estate in *fee* in the conveyee.

FROM GRAINGER.

This cause was heard at the December term, 1856, before LUCKY, Chancellor. Decree for the complainant. The defendants appealed.

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CROZIER, SHIELDS, and REESE, for the complainant.

HEISKELL and BARTON, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The decree of the Chancellor, in this cause, should be affirmed. We are satisfied from the proof that the verdict of the jury is correct, and that the true line between the parties was established by it. The decree, then, being sustained by the proof and the verdict of the jury, should stand, unless the Chancellor, in his charge to the jury, upon the issues submitted to them, committed some error. This, it is insisted by the defendants' counsel, he did.

But, after a careful examination of the charge, we are unable to perceive any error in it of which the defendants can complain.

It is objected, that the Chancellor did not give force enough to the survey, or plat, made out by the surveyor and commissioners, who divided the lands of John Coulter in 1812, and under which Jane Yancy derived her share in her father's estate.

The Court was asked to charge the jury, that the plat annexed to a grant, or partition, has the effect to control general or directory calls, and even locative calls, and is entitled to great weight in ascertaining a boundary, and particularly so, when it concurs, substantially, with course and distance.

In answer to this, the Court instructed the jury, that the plat was a circumstance to be taken into their consideration in ascertaining the true boundary of the land

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allotted to Mrs. Yancy; but it might be disregarded if the *calls* and *other evidence* in the case showed that the commissioners intended, and *did* include the whole of the 400 acre tract in their partition, going to the extreme boundary of that tract.

This is, in substance, the doctrine laid down by this Court in *Tate v. Gray's Lessee*, 1 Swan, 73, and is not in conflict with *Bell v. Hickman*, 6 Hump., 398. The party is entitled to the lands actually appropriated; and if the land had been *actually surveyed*, and the lines marked different from the plat, the marked boundary would control it. In this case, the evidence was abundant, of an actual survey and appropriation at variance with the plat; and the instructions of the Court were right.

It is next objected that the charge of the Court, in answer to the 4th, 5th, and 6th propositions of defendants' counsel, was erroneous. It may be well here to state, that the defendants had, in the year 1844, purchased of John M. Preston a tract of land adjoining that in dispute, and claimed that the deed taken by them covered the land in controversy, and that under it they had held seven years possession, and had title by the statute of limitations. This deed, however, and a regular chain of prior conveyances, showed that it did not embrace the land in dispute, but in fact called to adjoin the John Coulter 400 acres, and to corner on the *three pines* spoken of as a corner of his grant, and established by the jury as the true corner. But it appeared that the defendants, and those of whom they claimed, had held many years possession of two small pieces of the land, within the land in dispute, having them

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enclosed up to the disputed line; and that when Preston made the deed, one of defendants, upon a survey of the land, had, in some way, marked a line with his knife, so as to include all or a part of the disputed land. And the other proof in the case abundantly shows, that the possession of defendants was a naked one.

In this state of the case, the Court, after allowing the defendants to hold under the statute of limitations, to the extent of their actual enclosure, instructed the jury further, that if at the time Preston made his deed to the defendants, he went on the ground, designated and marked a line different from that called for in his deed, and the defendants held and claimed up to that new line, being different from the one designated in the conveyance and in the previous conveyances, and the same was held by the defendants for seven years, adversely, it would be such color of title, that, under the statute of limitations, they would be vested with the fee under the first section of the act of 1819; but that unless there was full and complete evidence that there was another line, known, marked, and recognized by Preston, at the time of his conveyance, different from the line called for as the line of the John Coulter 400 acre tract, defendants' deed would be confined to and bounded by the line which the jury might believe was the true original line of the grant; that should they believe the original north line of the 400 acre tract was where the complainant contended, the defendants' deed stopped at that point, unless a different one was marked and recognized by Preston at the date of his deed, in which event defendants' deed would go to it. That a line to be marked must have the usual designations on the trees, or other

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distinct and visible indications, showing, with reasonable certainty to the enquirer, that it was a boundary line.

It is alleged that this charge, in their inquiry as to the boundary, confined the jury to the acts and declarations of the parties at the time Preston made his deed to the defendants, and excluded from their consideration all antecedent and subsequent acts—possession and the like—tending to show where this true line really was. But we think an examination of the whole charge will show that this is not so, and that the case was fairly submitted to the jury upon all its facts, and that certainly the defendants have no valid ground of complaint against the charge.

The merits of the case have been reached, and we affirm the decree.

WILLIAM D. SMITH, EX'R, v. CHARLES METCALF.

1. TRUST AND TRUSTEE. *Trustee takes an estate co-extensive with the objects of the trust When the estate ceases. An estate co-extensive with the duties to be performed, will vest in the trustee, and he will take exactly that quantity of interest which the purposes of the trust require. which being executed, the trust estate ceases.*
2. SAME. *Same. Same. Case in judgment. Property was bequeathed, to be under the control and direction of the executor, for the benefit of the legatee, who was a feme covert. She died, leaving a husband and children surviving. Held, that the executor took an estate during*

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the life of the *feme covert*—that, at her death, the estate ceased, and the trustee could not, thereafter, maintain an action to recover said property.

FROM M'MINN.

This cause was tried at the December Term, 1857, GAUT, J., presiding. Verdict and judgment for defendant. The plaintiff appealed.

COOKE, for the plaintiff.

BAXTER, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

This was an action of detinue for a slave, Betty, in which judgment was rendered against the plaintiff, and he has appealed in error to this Court.

The plaintiff is the sole executor of Jackson Smith, who died about June, 1852, and claims the slave as *trustee* under his will, and the codicils thereto attached.

The testator had seven children, and in his will he gave to his daughter Harriet H. Grills, the one-seventh part of his estate, in fee simple. Afterwards, in a codicil is this clause; "In addition to the foregoing will and codicil, I make this, the second, codicil to said will. I revoke that portion of my will which gives to my daughter, Harriet Grills, the portion of property set apart in the foregoing will; and the reason why I revoke said portion of my will is, that I wish that my executors.

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to take the same into their control and management: and direct that they, my executors, manage said property heretofore given to Harriet Grills, in the same way that they are directed to control and manage the property given in the will to Elizabeth Emeline Lowry and Nathaniel D. Smith. I make this change in my will, being fully of the opinion that Jefferson Grills will not take that care of said property, that he should do."

In the will, the shares of Nathaniel D. Smith and Elizabeth Emeline Lowry, were not given to them, but to their children, "to be under the control and direction of my executors, and not at all to be under the control, either of my son, Nathaniel D. Smith, or my son-in-law, Alexander M. Lowry. I wish my executors to apply the rents and hires, if any, to the maintenance and education of said grand-children, or dispose of it to the best advantage of the grand-children, as they may think best."

Jefferson Grills was the husband of Harriet H. Grills, and is still alive, but she is dead, leaving children, some of whom are adults, and others are infants. The said slave, in the lifetime of Harriet H. Grills, was set apart to her, and permitted to go into her possession by the executor, where she remained until the death of said Harriet.

Subsequent to her death, and prior to the institution of this suit, the said slave was sold under a decree of the County Court of McMinn county, for distribution among the children of Harriet H. Grills, to which proceeding the present plaintiff was no party. At said sale, the defendant became the purchaser, took said slave into possession, and now has her. The plaintiff forbid the

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sale. The decree was had by the children of Harriet H. Grills, who were parties to the suit.

The only question in the case is, was the testamentary trust created by the will of Jackson Smith, determined by the death of Harriet H. Grills? If it was, then the plaintiff cannot maintain this action, because his estate in the slave had ceased.

The Circuit Judge charged the jury, that by a proper construction of the will, the share of Harriet H. Grills was vested in her absolutely; and that by the codicil afterwards made to the will, the testator only intended to prevent the marital rights of her husband attaching thereto, at least during her life; and for that purpose clothed his son William D. Smith, the present plaintiff, with a trust to manage and control the property during the life only of his daughter, the said Harriet H. Grills, and upon her death, the object of the trust having been accomplished, the trust itself terminated, and the present plaintiff had no further control over the property. That whether the marital rights of Jefferson Grills were entirely taken away, or only taken away during the life of Harriet H. Grills, it was not then necessary to determine; because, if the present plaintiff, at the time he instituted this suit, had no right to said property, or authority to control it, he could not sustain the action.

We think this charge of his honor, the Circuit Judge, was correct. It is plain that the testator, as to the share of Harriet H. Grills, would not have changed his will; but for his fears of the profligate habits of her husband, and his wish to exclude him from any control over the property during the *coverture*. That some of her children are yet infants, can make no difference, since

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the trust was not created, because of the *infancy of the children, but merely to protect the property against the marital rights of the husband.* It is well settled, that an estate, co-extensive with the duties to be performed, will vest in the trustee, and that he will take exactly that quantity of interest which the purposes of the trust require, which, being executed, the *trust estate* ceases. The case of *Ellis v. Fisher*, 3 Sneed, 231, is very much like this. There the husband survived the wife, who left infant children. The language creating the trust, was very comprehensive; yet it being evident, it was only intended to protect the property against the marital rights of the husband, the *trust estate* was declared to cease at the wife's death, and the estate itself, *eo instanti*, to go to the children.

Judgment affirmed.

LEROY M. WILEY *et al.* v. JOHN M. BRIDGMAN *et al.*

1. CHANCERY. *Jurisdiction. Execution. Sale of a remainder, or reversionary interest in realty.* A remainder, or reversionary interest in real estate, can be sold by an execution at law. A bill in Chancery is not necessary to reach such interest, and will be dismissed upon demurrer. The remedy at law, is complete, and the Chancery Court has no jurisdiction.
2. SAME. *Same. Waiver of jurisdiction. Act of 1852, ch. 365.* Although a demand may be, purely, a legal one, an order *pro confesso*, or an answer to the merits, is a waiver, under the act of 1852, ch. 365, of the question of jurisdiction.

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3. **EXECUTION. Practice. Sheriff. Remedy when there is doubt as to the proper disposition of money raised on several executions.** If the sheriff has raised money, under several executions issued from the same Court, and is at a loss how to distribute it, the Court will, in a summary way, upon the facts stated in the return, advise how it should be distributed. It has the power over its suitors, and will so appropriate the money as to bind them, and protect the sheriff.

FROM BLEDSOE.

Decree for the complainants, at the March Term, 1858, before VAN DYKE, Chancellor. The defendant, Bridgman, appealed.

LYON, for the complainants.

WELCKER AND KEY, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The defendant, John M. Bridgman, filed a demurrer to the complainant's bill, but the Chancellor overruled it. In this we think he erred.

That a reversionary, or remainder interest in real estate, could be sold by execution at law, was decided in *Kelly v. Morgan's Lessee*, 3 Yer., 437.

The complainants then had a complete remedy at law, and to ask relief in equity, was not only useless, but expensive and mischievous. They already had a judgment in the Circuit Court, with an execution and levy upon the land, and all they had to do, was to sell it under that writ. But instead of doing this, the sheriff is made

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a party defendant to the bill, and restrained by injunction, from making the sale, and a decree to sell asked in Chancery.

This proceeding cannot be justified by the fact that sundry executions in favor of other creditors of Bridgman, from a justice of the peace, had been levied on the same land; because they had all been returned to the *Circuit Court of Bledsoe county*, the same Court in which complainants judgment was had, and orders of sale made; and all the executions must, necessarily, be in the hands of the same sheriff, or returnable to the same Court; and having the money produced by the sale in his hands, he could readily apply it, according to the priorities of the writs; or if he had doubts how to distribute it, the Court would advise him.

It is well settled, that where a sheriff has raised money under several executions, and is at a loss how to distribute it, the Court will, in a summary way, upon the facts stated in the return, advise how it should be distributed. It has the power over its suitors, and will so appropriate the money as to bind them and protect the sheriff. *Washington et al. v. Saunders*, 2 Dev. 343.

The case of *Parrish v. Saunders and Martin*, 431, was a conflict between different Courts.

We are, therefore, constrained to reverse the decree of the Chancellor, and to dismiss the complainants' bill.

But as to the bill of Benjamin F. Bridgman, no demurrer was filed by John M. Bridgman, and it was taken *pro confesso*, as to him. This is equivalent to an answer, admitting the allegations of the bill; and if the demand of Benjamin F. Bridgman was purely a legal one under

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the act of 1852, ch. 365, sec. 9, the question of jurisdiction is waived. Acts 1851-2, page 672.

He is; therefore, entitled to hold his decree.

The complainants, Wiley Banks & Co., will pay the costs of their bill; and they, with the other parties to that suit, will be left to preserve their legal remedies under the levies.

SAMUEL KELLY v. SAMUEL W. DAVIS.

1. PRACTICE. *Traffic with slaves.* Act of 1813, ch. 135, § 3. The act of 1813, ch. 135, forbidding all traffic with slaves except for articles of their own manufacture, without permission of the owner of said slaves, does not contemplate a criminal proceeding as the mode of recovery of the fine imposed for such offence. The word "fine," as used in said act, is inartificial, and is to be understood in the sense of penalty, to be recovered by action of debt.
2. SAME. *Same. Same.* The provision of the act of 1813, ch. 135, forbidding all traffic with slaves, except for articles of their own manufacture, without the permission of the owner, which appropriates the one-half of the penalty imposed by said act to the use of the person who will sue for the same, and the other half to the use of the owner of the slave with whom such unlawful traffic may be had, does not preclude the owner of such slave from maintaining the suit for such penalty himself.
3. SAME. *Evidence.* Where the plaintiff in an action of debt for the recovery of a statutory penalty, voluntarily proves by his own witness that he had recovered a former judgment against the defendant for the same cause of action, without explanation, he thereby defeats his right of recovery, although the record of such former recovery be not produced.

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4. *SAME. Statute* Where a statute imposes a penalty, and prescribes no form of action for its recovery, debt may be maintained.

FROM GREENE.

Debt, from the Circuit Court of Greene county. Verdict and judgment below for the plaintiff, and appeal in error by defendant.

T. D. and R. ARNOLD, for the plaintiff in error.

CRAWFORD, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This suit was commenced before a justice of the peace, under the third section of the act of 1813, ch. 135, which prohibits all traffic with slaves (except for articles of "their own manufacture") without permission of the owner.

The first section prescribes the penalty, and likewise the mode of recovery, as follows: the person so offending "shall be *fin*ed in a sum not less than five, nor more than ten dollars; to be recovered before any justice of the peace of the county wherein such offence shall be committed; one-half to the use of the person who shall sue for the same, the other half to the use of the owner of such slave or slaves."

In that part of the act which declares the penalty, there is a want of exact technical precision in the use of the word "*fin*ed," but, notwithstanding, from the whole of the first section taken together, the meaning of the law is plain enough.

The mode of recovery contemplated by the Legislature was not, as has been assumed, in the form of a

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criminal proceeding: the inaccurate use of the word "fined"—upon which this assumption is based—does not warrant any such construction. The meaning obviously is, that the offending party should be subject to the penalty of not less than five nor more than ten dollars, in the discretion of the justice. The construction contended for derives no support from the omission of the Legislature to prescribe *any form of action*. It is a familiar principle of pleading, that if a statute prohibit the doing an act, under a penalty or forfeiture, and do not prescribe any mode of recovery, *debt* may be maintained. 1 Chitty's Pl., 127.

The objection, that no right of recovery is given to the master or owner of the slave, is not well founded. True, the statute does not, in express terms, give the master the right to sue for the *penalty*; but it must be implied that it was the intention of the Legislature that he should have such right. The master, in general, is the person injured by the violation of the statute; and, in reason, the recovery should inure to *his* benefit. And the Legislature intended, not to deny him the right of recovery, but to provide that, if a stranger stepped in before him and sought to recover the penalty, that, still, one-half of the penalty should inure to the masters's use.

Thus far, and upon all the other points made in the case, the instructions of the Court were correct, except as to the effect of the parol evidence of a former recovery. The plaintiff in making out his case before the jury—as would seem from the record before us—saw proper to prove the fact, by his own witness, that he had recovered a former judgment against the defendant

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for \$10, before a justice of the peace, for the same cause of action for which the present recovery was had. Of this no explanation is given in the proof, and *prima facie* the former judgment was regularly obtained and remains in full force. The defendant offered no evidence whatever, as it appears. Acting upon the assumption, as, for the present, we feel bound to do, that such former judgment was obtained, the present suit cannot be maintained. The plaintiff, who voluntarily made this proof, cannot now escape the consequences on the ground that the record of the former suit was not produced. It is very true, that the defendant could not have set up this ground of defence without the production of the record, had not the plaintiff, by his own proof, dispensed with the necessity of the higher evidence. The point is, that the plaintiff by his own evidence, which was allowed to go to the jury without any objection on either side, has defeated his right to maintain the present action.

Taking the case as presented in the record, the judgment must be reversed on the latter ground alone. On another trial the plaintiff will have an opportunity to present his case properly, and the defendant to make his defence.

Judgment reversed.

WILLIAM MEAHER v. MAYOR AND ALDERMEN OF CHATTANOOGA.

1. PRACTICE. *Powers of municipal corporation.* A fine, forfeiture, or penalty, imposed by an ordinance of a town corporation for an offence against the municipal laws, may be recovered by warrant in debt,

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and the only proof required is, that the particular offence has been committed. So, where a town ordinance creating a certain misdemeanor, provided that whoever should be *convicted* of the same, should pay a certain designated fine, it is held, that a conviction, in the sense of the ordinance, is simply sufficient proof of its violation and that the proceeding for the recovery of the fine might be by warrant in debt, and a judgment thereon by the proper officer.

2. *SAME. Same.* Where a corporation ordinance provides that whenever complaint is made on oath to the recorder of its violation, he shall issue his warrant for the arrest of the offender; it is held that the recorder is not thereby precluded from issuing his warrant without such complaint on oath, or upon his own knowledge, that the offence has been committed.

FROM HAMILTON.

The plaintiff in error was fined by the recorder of Chattanooga for a violation of a town ordinance. He brought the matter by writ of *certiorari* before the Circuit Court of Hamilton county. The Court rendered judgment dismissing the petition, from which petitioner appealed in error.

BURCH and MITCHELL, for plaintiff in error.

WELCKER and KEY, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

The recorder of the city of Chattanooga issued a warrant in debt against Meaher for fifty dollars, which, as stated in the warrant, he owes "in consequence of a forfeiture or penalty, incurred for a misdemeanor for keeping a disorderly house in the city of Chattanooga, contrary to the provisions of the 10th section of an act passed by the mayor and aldermen 7th January, 1852."

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The 10th section referred to creates the misdemeanor, and the 14th section of the same ordinance prescribes the penalty, thus: "whoever shall be convicted of a misdemeanor under any of the provisions of this ordinance, shall forfeit and pay to this city a sum of not less than three nor more than fifty dollars."

Judgment was given by the recorder against the defendant for \$20, and the case was taken to the Circuit Court by *certiorari*, where the same was dismissed, and is brought here by writ of error. Upon the facts stated in the petition, the following questions are made and argued:

1. It is contended that the action for the forfeiture would not lie until a *conviction* was first had for the misdemeanor. We think two proceedings unnecessary. To sustain the action for the penalty it would be indispensable to prove the offence stated in the warrant. There was no penalty to be recovered if the misdemeanor did not exist. As a part of the case—the very foundation of it—the offence would have to be made out before the recorder. How could there be a separate proceeding? There was no power to indict—the city can only operate by fines, forfeitures and penalties, and then to be recovered by warrant. If the fine, forfeiture, or penalty—for the name is not so material—is fixed by the ordinance, for any particular thing, that may be recovered by warrant, and the only proof required is, that the offence or act to which such fine or forfeiture is attached has been committed. Debt is the proper action for penalties prescribed for certain offences by acts or ordinances. This is the well settled law, and has been recognized at the present term.

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2. The second ground relied upon to reverse is, that the warrant was issued without any "complaint on oath" made before him, as required by the 1st section of the ordinance of 1852. When such complaint is made, the ordinance requires that he "*shall*" issue a warrant for the arrest of the offender, but he is not precluded from issuing it without such oath, or upon his own knowledge. If he were sued for malicious prosecution this might be a matter of consideration, but it is presumed it does not vitiate the proceedings.

These two objections were taken by pleas in abatement before the recorder, and in the petition for *certiorari*, which was dismissed by the Circuit Court. The offence of keeping a disorderly house is not denied in the petition, and so no merits are shown.

The petition was properly dismissed, and the judgment will be affirmed.

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1. CHANCERY. *Ignorance of law. Application of the principle.* The maxim, that ignorance of the law is no excuse for the breach, or non-performance of an agreement, applies, *alone*, to general public laws, which prescribe a rule of action for the whole community; and has no application to special or private acts, which are only intended to operate upon particular individuals. Nor, does it apply to foreign laws, or to the laws of the other States of the Union. Ignorance of those laws, is deemed to be ignorance of *fact*.
2. SAME. *Same. Same. Bank Charters.* In the application of this legal maxim, a private Bank Charter, which is merely the *title* of the parties, stands upon the footing of special, or private acts: foreign laws, and the laws of the other States of the Union.

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- 3 SAME. Same. Same. *Confined to cases of pure, unmixed mistake of law.* This highly artificial and rigid doctrine, is confined to cases of pure, unmixed mistake of law, in which there is no mistake of fact, no trust, or element of fraud entering in, and conducing to the making of the contract.
4. SAME. *Mistake of fact. When a Court of Equity will relieve against.* If a contract is entered into in good faith, by which it is mutually understood and intended, for an adequate consideration, the one party shall part with, and the other acquire a valid title to property; and it turns out that, at the time of the contract, by the operation of some settled principle of law of which they were alike ignorant, the supposed title is wholly valueless or did not, in legal contemplation, exist; in such case, the mistake is not a mere mistake of law: it involves, in some measure, a mistake of fact, as well as of law: and a Court of Equity will replace the parties in *statu quo*.
5. SAME. Same. Same. *Fraud not necessary to relief.* In cases of mutual mistake going to the essence of the contract, it is not necessary that there should be any element of fraud to warrant the interposition of a Court of Equity. Relief will be granted on the ground of mutual mistake, as to the existence of the thing which constituted the basis of the contract.
- 6 SAME. *When negotiable paper subject to equities, in the hands of the endorsee.* The transfer of negotiable paper in payment of, or as a security for a pre-existing debt, is not a transfer in the due course of trade, so as to protect the paper in the hands of the holder from the equities, to which it was subject, between the original parties.
7. SAME. Same. *Lex loci contractus, governs. Pennsylvania.* The right of parties is to be governed by the law of the place where the contract is made. In this case, the contract of endorsement was made in Pennsylvania; and, although the course of judicial decision in that State, as to the equities to which negotiable paper is subject in the hands of the endorsee, is different from ours; yet, it is settled by her Courts, that the transfer of the note of a third person, as collateral security for a pre-existing debt, without a new consideration, will not place the person to whom it is transferred, in the condition of a holder for value, so as to protect him against the equities subsisting between the original parties.

FROM KNOX.

This cause was tried before LUCKEY, Chancellor, who dismissed the bill. The complainant appealed.

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NELSON, MAYNARD and COCKE, for the complainant.

TRIGG and TEMPLE, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This bill was filed in the Chancery Court at Knoxville, to have rescinded and annulled, a contract entered into on the 28th of September, 1855, for the purchase of a supposed banking institution, located at Knoxville, including the capital stock, debts, and effects of every description, by the complainant, from the defendants, Doolittle & Co., for the consideration of \$37,500.00, for which the former executed his several promisory notes payable to the latter.

The supposed institution claimed a legal existence, under and by virtue of an act of the General Assembly of this State, passed on the second of March, 1854. It went into operation in January, 1855, under the adopted name of "The Miners and Manufacturers' Bank," the stock being owned by the defendants, Doolittle & Co.

The act of 2d of March, 1854, above referred to, contains *seventy-five* sections. By said act, various companies were incorporated for different purposes, having no connexion with, or relation to each other. By the four last sections of the act, certain persons therein named, "were created a body politic and corporate, by the name and style of the Southern Mining Company." In addition to numerous and extensive powers conferred upon said company, in express terms, there is a provision in the 73d section, that it should

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"have all the powers, franchises, rights, privileges, and immunities conferred upon the corporation and body politic, created by an act December 27th, 1843, ch. 60." The act here referred to, merely by the date of its passage and chapter, was the charter of incorporation of the "Bank of East Tennessee," with a capital stock of eight hundred thousand dollars.

Under the banking power thus derived, the "Miners and Manufacturers' Bank" was established.

The act of 2d March, 1854, under which said Bank claimed to have been chartered, contained (in the 3d and 46th sections) the reservation of an express power to repeal and dissolve any company created by virtue of that act, "at the pleasure of the Legislature." And in the exercise of the power thus reserved, the Legislature—for reasons deemed sufficient—by an act passed on the 28th of February, 1856, ch. 113, sec. 16, repealed and annulled, *in toto*, the charter granted to the before named "Southern Mining Company," so far as said charter conferred "banking privileges" on said company.

It appears, that not long after the passage of the act of March 2, 1854, the charter of the "Southern Mining Company" was offered for sale; and a copy of what purported to be the *entire charter* of said company, was procured. This copy embraced the four last sections (secs. 72, 73, 74, 75,) of the act above referred to; to which was appended, in full, the charter of the "Bank of East Tennessee." This copy was duly certified by the Secretary of State, under the seal of the State, to be "*a full and perfect copy* of all that part of an act passed March 2, 1854, by the General Assembly of said State, which relates to the Southern Mining Company."

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But, in said copy, *the sections reserving to the Legislature the right and power of repeal, at pleasure, were wholly omitted.*

Upon the faith of this copy being what it imported upon its face, and was certified to be by the proper officer, a full and perfect copy of the charter of said company; the defendants, Doolittle & Co., became the purchasers thereof, in the latter part of the year 1854, for which they paid \$12,500.00; and in the like faith, the complainant contracted with them for the purchase of the bank, (established under said charter,) in September, 1855. The fact, indeed, is placed beyond all question, that no one of the parties to this suit, or connected with the bank, had any knowledge, or even suspicion, that the charter of the company, under which the bank was organized, was at all subject to the will or power of the Legislature, until the passage of the repealing act of February 28th, 1856. And even then, it was denied by the bank, that the sections of the act reserving the power of repeal, had any application to the charter granted to the "Southern Mining Company;" but, on the contrary, had reference alone to the companies created by the sections of the act, which, in the order of place and number, preceded those sections which conferred the power of repeal. And this opinion was entertained, it seems, until, in a judicial proceeding, to which the bank was a party, it was declared by this Court, in September, 1856, that the power of repeal extended, as well to the charter under which the "Miners and Manufacturers' Bank" claims a corporate existence, as to all the other charters of incorporation granted by the act. (See 3 Sneed, 610.) And that by

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the repealing act of 1856, the legal existence of the bank was totally destroyed.

It appears from the proof, that the purchase of the charter by the defendants, Doolittle & Co., was partly negotiated through the complainant. It likewise appears, that the complainant was made President of the bank on its first establishment in January, 1855, and that he remained in that office up to September of the same year, when, by his purchase from Doolittle & Co., he became sole owner of the bank. It is shown in the proof, that, prior to September, 1855, the Bank had become embarrassed in its operations, mainly in consequence of large advances made to the complainant, and also, to Doolittle & Co. To relieve the bank of this embarrassment, the complainant went to Philadelphia—where Doolittle & Co. resided—and negotiated a purchase of their entire interest in the bank.

It is also shown in the proof, that the promissory notes made by the complainant to Doolittle & Co., in consideration of the purchase of the Bank, were, at the time of their execution, transferred by indorsement, in part, to the defendant, Fuller, and in part to one Barnitz.

Prior to the 28th of September, 1855, the date of the complainant's purchase of the bank, Doolittle & Co. were largely indebted to Fuller and Barnitz, severally, for moneys by them advanced to the former, for the benefit of said bank. For these advances, Fuller and Barnitz, respectively, held the promissory notes of Doolittle & Co.; to secure the payment of which, the latter had placed in their hands various stock bonds and other evidences of debt, and also a large amount of the issues

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of said bank. It seems that Fuller and Barnitz were parties to the negotiation between the complainant and Doolittle & Co., in relation to the purchase of the Bank. And by an arrangement between the parties, with the mutual consent of all, the notes of the complainant were transferred to Fuller and Barnitz, and accepted by them, in lieu of the notes which they respectively held on Doolittle & Co.; and certain mortgages executed by complainant, to secure the payment of his notes to Doolittle & Co., were, at the same time, transferred to Fuller and Barnitz. Upon this transfer being made, the latter gave up to the former the promissory notes which they held on them; but, as further security retained the collaterals which had been pledged to secure the payment of said notes thus given up, and refused to surrender them until their respective debts were fully paid.

The proof, upon this point of the case, establishes, that the notes of the complainant were not accepted by Fuller and Barnitz in absolute payment of their pre-existing debts against Doolittle & Co. This fact is placed beyond question by their requirement that the liability of Doolittle & Co. should be continued by their indorsement of the complainant's notes; and likewise by the requirement, that the collaterals deposited with them for the security of the pre-existing indebtedness of Doolittle & Co., should still be retained. Both of these requirements are utterly incompatible with the idea that the complainant's notes were received in discharge of the prior indebtedness of Doolittle & Co.

The result of the proof, then, is, that the complainant's notes were taken merely as additional security for

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a prior indebtedness, and with full knowledge of the consideration for which they were given.

It should have been previously noticed, that Barnitz, being indebted to Fuller, transferred to the latter the notes of the complainant which had been indorsed to him, together with the mortgage for the security of the debt.

Upon the foregoing facts, two questions are submitted for our determination. First. Whether or not, as against the defendants, Doolittle & Co., the complainant is entitled to a rescision of the contract. And if so, secondly. Whether or not the notes in the hands of the defendant, Fuller, are subject to the same equity, as if they still remained in the hands of the payees.

1. The complainant cannot, we think, be repelled on the ground, that the charter, being a public act, the law imputes to the complainant, and charges him with knowledge at the time of making the contract, not only of the entire contents of the charter, as a matter of fact; but, likewise, of the rules and principles of law applicable to each and all of its several provisions. This position is not tenable. Whether an act incorporating a Bank, for the sole benefit of private individuals, may not, in some sense, and for some purposes, be regarded as a public law, is a question we need not now discuss. For, if this were even to be admitted, no one will be heard to say, that it is a general law, affecting the whole community. And we have held, that the familiar maxim, that ignorance of the law is no excuse for the breach or non-performance of any agreement, because any one is presumed to know the law, applies only to general public laws, which prescribe a rule of action for the

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whole community; and that it has no application whatever to special or private laws, which are only intended to operate upon particular individuals. See 1 Sneed, 698-716.

A special or private law, in this respect, stands upon the same footing with the law of another government. And all the authorities concur, that ignorance of foreign law is deemed to be ignorance of *fact*; because no person is presumed to know the foreign law; and it must be proved as a fact. 1 Story's Eq. Jur., sec. 140, and note 3. And in this view, it has been held, and we think correctly, that the laws of the other States of the Union are to be regarded as foreign laws. 9 Pick. R., 112; 3 Shepley R., 45.

We perceive no sufficient reason why a private bank charter—which is merely the *title* of the parties—should be placed upon a different footing, as regards the application of the legal maxim under consideration, from a title to other private property.

But, again: the same result must be arrived at upon the principles assumed in the argument for the defendants.

The well established principle, both in equity and at law, upon which the argument against relief in this case is based,—that ignorance or mistake of law, will not be allowed to affect the solemn contracts of parties, nor excuse from the legal consequences of particular acts,—is to be taken with this important qualification, that there is no mistake of fact, no trust, or element of fraud, mixed up with it. 1 Story's Eq. Jur., sec. 110-136; Adams' Eq., 188-9. It will be found, upon an examination of the best considered cases, that the

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application of this highly artificial and rigid doctrine, has been confined to cases of pure, unmixed mistake of law. But, if a contract is entered into in good faith, by which it is mutually understood and intended that, for an adequate consideration, the one party shall part with, and the other acquire, a valid title to property; and it turns out that, at the time of the contract, by the operation of some settled principle of law—of which they were alike ignorant—the supposed title was wholly valueless, or did not exist, in legal contemplation; in such case, the mistake is not a mere mistake of law; it involves in some measure a mistake of fact, as well as of law; as the very idea of title comprehends as well matter of fact, as of law. 1 Story's Eq., sec. 122-130.

But, in the case under consideration, the mistake, as it seems to us, was properly a mistake of fact. The parties, at the time of the contract, mutually believed—as they well might—that the copy of the charter, furnished by the proper officer, was a full and perfect copy. They mutually assumed that the charter was indefeasible, during the period for which the charter was granted; and that the corporate rights, privileges, and immunities thereby conferred, were beyond the control of the Legislature, or any other power known to the government. They were alike utterly ignorant of the *fact*, that there was an *omission* in the copy of the charter, under which they acted, to set forth the all-important condition, contained in the original act of incorporation; by which the corporate existence of the bank instead of having an absolute, unconditional right of duration, subject to no human contingency, for the

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period limited in the charter,—was in reality a thing at the mere pleasure of the Legislature, subject to destruction at any moment; and which, in fact, was totally destroyed, in the short period of five months after the date of the contract. This, then, was a mistake of fact, resulting from ignorance of the omission in the copy as well as from ignorance of the existence of the reserved power of repeal, in the original charter.

That this is such a mistake, as a Court of Equity will relieve against, can admit of no doubt. It is, in principle, like the case of a contract made for a consideration which is really non-existent, but which both parties, at the time, mistakenly suppose to exist. In such case, the one cannot give, nor the other receive, the thing intended to pass: and the obvious equity is, to replace the parties in *statu quo*.

In cases of mutual mistake, of this description, going to the essence of the contract; it is not necessary that there should be any element of fraud to warrant the interposition of a Court of Equity; on the contrary, equity will relieve on the ground of mutual mistake as to the existence of the thing which constituted the basis of the contract. See Adams' Eq., 188-19; 1 Story's Eq., sec. 140, 146.

Nor does the fact, that the reserved power of repeal had not been exercised, at the date of the contract; and, by possibility, might never be exercised, affect the principle. It is enough that there was a radical defect inherent in the subject matter of the contract—of which the parties were mutually ignorant—which might at any moment work its entire destruction.

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The contract, therefore, was not what either of the parties understood and intended it should be.

Nor does the fact, that the purchase of the charter, by the defendants, was negotiated through King, affect the case: as there is not the slightest reason to suppose, from the proof in the record, that either he, or any of the other parties, had any suspicion of the omission in the copy of the charter, prior to the repeal in February, 1856. This disposes of the case as to the defendants, Doolittle & Co.

The remaining question is—whether the notes, in the hands of defendant Fuller, are subject to the same equities as between the original parties.

According to the course of decision in this State, the transfer of negotiable paper in payment of, or as security for, a pre-existing debt, is not a transfer in the due course of trade, so as to protect the paper in the hands of the holder from the equities to which it was subject between the original parties. 2 Humph., 192; 1 Humph., 468; 6 Humph., 443.

But, as it appears that the notes in question were both made and indorsed in the city of Philadelphia, of course the determination of this question must be governed by the law of the place where the contract of indorsement was made. We have been referred to several Pennsylvania cases, from which it seems that the course of judicial decision, upon the question, is different in that State from ours. Yet it appears to be settled there, that the transfer of the note of a third person, as collateral security for a pre-existing debt, without some new and distinct consideration, will not place the person to whom it is transferred in the condition of a

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holder for value, so as to protect him against the equities subsisting between the original parties. 11 Serg. & Rawle, 377; 6 Wharton, 220; 9 Harris, 237; 4 Binney, 366. And this is enough for the determination of the present case.

We have seen that the notes of the complainant were received by Fuller, merely as additional, or collateral security for a pre-existing debt due to him from Doolittle & Co., and really without any distinct new consideration.

It likewise clearly appears, that Fuller had full knowledge of the consideration for which said notes were given, and of all the facts connected with the transaction between the complainant and Doolittle & Co.

The relation of Fuller to that transaction is peculiar. Though the proof is rather obscure, yet there are circumstances tending to induce a belief that he was in some way secretly interested with Doolittle & Co., in the bank, and in the dealings with the complainant. The proof is clear, that he participated actively in the negotiation for the sale of the bank to complainant; and, indeed, the terms of the agreement seem to have been chiefly adjusted through his instrumentality.

We are of opinion, therefore, that the defendant Fuller, is affected with all the equities which existed against the notes in the hands of Doolittle & Co.

It follows, therefore, that the complainant is entitled to a rescission of the contract, and to have the several notes surrendered up and cancelled; and also to have refunded the amount paid in discharge of the first note with interest thereon. And it will be so decreed.

Decree of the Chancellor reversed.

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MARY HOYLE v. H. L. SMITH *et al.*

- I. HUSBAND AND WIFE. *Marriage settlement. Gifts inter vivos. Construction.* Where, by a marriage contract, in which the property of the wife was settled upon her with a provision, that, in the event she bore children, she should have no power of disposition; but if she bore no children, her power of disposition should be as that of a *feme sole* over her own property; but which declared her power of disposition to be by will, or in the event of her dying without a will, that the property should "descend to the person or persons that she may have, in her lifetime, said it should go to, and vest in as valid a manner as if she had made her will;" it is held, that her power of disposition is only testamentary in its character, and that a deed of gift, *in presenti*, by which the wife conveyed the property to another, was unauthorized by the contract, and therefore void.
2. CASES CITED. 4 Yerg., 375; 8 Humph., 159; 1 Swan, 489.

FROM M'INN.

This cause is from the Chancery Court at Athens. Decree below by Chancellor VAN DYKE, for the defendants. Complainant appealed.

HOYLE, for the complainant.

COOKE, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

This case is to be decided upon the construction of the marriage contract entered into between the complainant and her husband, John Hoyle, on the 12th of February, 1829. The question is, as to the power of complainant, under that instrument.

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The rule laid down in *Morgan v. Elam*, 4 Yerg., 375-451, and followed in many cases since, is, that the Courts shall give effect to the intention of the parties; which intention is to be collected from the whole scope of the instrument. That the wife's power and right to dispose of the property in the contract, are not those of a *feme sole*, but depend upon the terms of the deed of settlement; and that she can dispose of the property only in the manner and by the modes designated in the deed. And if she do so in any other mode, her act is void. 8 Humph., 159, 209; 1 Swan, 489.

Testing this marriage contract by these rules, the deed of the complainant to James Henry Smith, dated the 2d of October, 1844, is inoperative, for want of power in her to make it. It is a *deed of gift in presenti*, of her entire estate, in the slaves. But this the deed of marriage settlement did not provide for or contemplate. She had no power, as we think, to make gifts *inter vivos*, or conveyances to take effect previous to her death. Her powers of disposition are only testamentary in their character. This, we think, appears from the entire reading and scope of the instrument.

If she had children, she was not to have any power of disposition at all. If she had none, then she was to have the same right of disposition as if she had not married. These terms are very comprehensive; and taken singly, and alone, would have great effect. But they are immediately qualified by what follows; and the parties go on and at once designate the complainant's powers. That is, that the estate shall be hers, and at her disposal *by will*, or if she should die *without a will*, it shall *descend* to the person, or persons, that she may,

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in her life-time, say it shall go to; and the right shall be vested in said person or persons, in as valid a manner as though she had made her *will*; and John Hoyle, the husband, binds himself, his heirs, etc., to surrender the possession of the estate to any person that may be entitled to it by *her will*, or, *as aforesaid, at her death*: and if *she died without a will*, proof of her saying who should have her *property, by two or more persons disinterested, and of good character*, should be sufficient to vest the right agreeably to the *above article*. Her powers look altogether to acts that are to have effect at her death. If she leave a will, then that supersedes every other power of disposition. If she leave no will, or be *in extremis*, then she may say, in the presence of witnesses, what person shall take her estate. Was it intended that she could, by gift, in her life-time, deprive herself of the entire estate. In the language of the Lord Chancellor in *Reid v. Shergold*, 10 Ves., 378, are not her hands tied up from indulging her inclination against herself? Is not the power confined to a giving by *will, or other act in the nature of a will*, revocable in every period of life; the power given in that way to protect her against her own act?

Again, he says, "it is impossible to hold, that the execution of an instrument or *deed*, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of her death, can be considered, in equity, an attempt in, or towards the execution of the power." 10 Ves., 380.

We reverse the decree of the Chancellor, and decree for complainant.

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ALBERT M. PIPER v. A. E. SMITH *et al.*

1. **PARTNERSHIP.** *As to partners right to compensation for services to firm.* A partner is not entitled to extra compensation for services rendered the firm in the absence of an express contract to that effect. And this is so as to a surviving partner also, upon whom devolves the trouble and responsibility of settling the affairs of the partnership.
2. **SAME.** *Descent and distribution. As to real estate owned by firm.* Act of 1784, ch. 22, § 6. Where real estate is held by partners for partnership purposes, it descends and vests in the heirs at law of a deceased partner, as real estate in other cases.
3. **CASES CITED.** *McAlister v. Montgomery*, 8 Hay., 97; *Featman v. Woods*, 6 Yerg., 21.

FROM KNOX.

This bill was filed in the Chancery Court at Knoxville, for the adjustment of a partnership account. At the July Term, 1858, Chancellor LUCKY rendered a decree defining the rights of the parties, from which complainant and one of the defendants appealed.

BAXTER, for complainant.

LYON, for defendants.

CARUTHERS, J., delivered the opinion of the Court.

This bill was filed 7th December, 1855, and the case involves the settlement of three different partnerships or mercantile firms.

1. That of C. H. & D. L. Coffin, which was formed 26th October, 1846, and commenced business on a capi-

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tal of \$30,863, of which \$22,346, was furnished by Charles H., and \$8,527 by Daniel L.

2. That of C. H. & D. L. Coffin & Co., constituted, 17th July, 1851, by the admission of A. M. Piper, the complainant, into the firm, who furnished no capital, but was to have one-fifth of the nett profits for his personal services.

3. A firm of the same name, continuing, after the death of Daniel L., by the introduction of his widow and administrator into his place.

The said Charles H. is now dead, and his personal representatives are made parties.

Daniel L. died without children, and his widow, personal representatives, and heirs at law, are parties.

No account has yet been taken, but an interlocutory decree settling the rights of the parties, involving various important questions, was made at the last July Term of the Chancery Court.

1. The first question is, as to the right of complainant to claim compensation for his services, either after or before the death of the other partners. Whatever may be thought of the justice of the rule, where the services of members of a firm are unequal, there is certainly nothing better settled, than that such a claim cannot be made without an express stipulation to that effect. 1 J. C. R., 157; 3 do., 431; 7 Page, 483. The law does not undertake to measure between the partners the relative value of their services, severally bestowed upon the joint business, without an express contract. 3 Kent, 37, note (a). Though the rule may seem still harder in the case of the surviving partner, yet, it is the same, he can have no compensation for trouble

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or services in settling up the business, unless the same be stipulated. 3 Kent 64, (note); Story on Part., 447 1 Ves. & Bea., 170. This disposes of the only question in which the complainant is interested. But as to the rights of defendants among themselves, the following difficulties arise, which have necessarily to be adjusted by the rules of law, as the original parties are not here to act for themselves, and the interests of minors are involved.

1. As to the right of Charles H. to interest upon his excess of capital. This seems to have been the original agreement of the parties, and regularly allowed until about, or after the formation of the second partnership, when the question was raised by Daniel L., whether the failure of the health of Charles H., and the consequent inability on his part to render the efficient and active services he had before done, and which the former continued to do, should not suspend the allowance of interest during the continuance of such disability. This was an honest and friendly difference of opinion between the brothers, as to what was right and just in the matter. It seems to have produced no alienation of feeling, and both were desirous to have it settled correctly. In this spirit they referred it to their brother-in-law, Judge McKinney, but he declined to act, on account of his inexperience in mercantile affairs, but recommended them to refer the question to another brother-in-law and mutual friend, Mr. Bowie, of Charleston, South Carolina, who was an intelligent and experienced merchant. This was readily agreed to, and he settled the question in favor of the right of Charles H. to the interest. Daniel L. was not still satisfied on the subject,

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and there is no evidence that he ever fully yielded up his opinion, or acquiesced in the demand. But yet he should, perhaps, be held bound by the decision of the referee, Mr. Bowie, and particularly as he continued to use and employ the excess of capital in the business, as before. Besides this, there is evidence going to show that the services of Charles H. to the firm, though not exactly of the same kind as those of Daniel L., were not less valuable. The same reasons and considerations apply to the firm of C. H. & D. L. Coffin & Co., and the continuation of the business.

2. The next, and most important question arises between the distributees, and heirs at law of Daniel L., as to the effect of an investment made by the second firm, in real estate. Three lots were purchased in Knoxville, one with a view to the erection of three fine store houses. The houses have been built and finished at considerable cost, out of the means of the firm. They were commenced in the life-time of Daniel L., when the contracts were made for all the brick-work and much of the other material. But the erections were continued and finished after his death, and after the death of Charles H., by the surviving partner, Piper. So it will be seen that a part of the estate of Daniel L., which was stock or personalty at his death, and would have gone to his distributees, has gone into the said houses, and thereby become realty; and will, as such, go to his heirs upon our construction of the law, and they are different persons. This would not be important, however, if the position assumed for the distributees be correct, to-wit, that the law regards realty belonging to partners, and purchased with firm means,

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as personalty. But is that the law? This question was not free of difficulty in England, but the doctrine was ultimately settled there, to be, that all real property owned by the partners, and used in carrying on their business, and all such as may have been purchased with the means, and in the name of the firm, should be deemed partnership stock, and treated as personalty. According with this, are the American cases, in 4 Munford, 316; 7 Connecticut, 11; and other cases; and the opinion of Chancellor Kent, in his 3 Vol. Com., 14, and subsequent pages, where the subject is fully treated. But, on the other side, there are high and numerous authorities in that country, and in this, 3 Brown, 199; 7 Ves., 458; 9 Ves., 500; 15 Johnson, 159; 11 Mass., 469. It may be said, that the weight of authority is, that it is to be regarded as stock, and should be so held, if the question was an open one in this State. But as early as the year 1816, in the case of *McAlister v. Montgomery*, 3 Haywood, 94; the act of 1784, ch. 22, sec. 6, Car. and Nich., 417, was held to have settled this question in favor of the heirs of deceased partners. And again, in 1884, in the case of *Yeatman v. Wood*, 6 Yerger, 21, that case was approved and followed. It is said these cases are not well considered, and should be reviewed. But an important rule of property having been thus settled, and so long acquiesced in, should not now be disturbed, even if we considered it originally wrong. It is easy to see the mischief and hardship that would result from shaking or unsettling fixed rules of property, in view of which men have acted and made investments for so great a length of time. A rule that might act as we would desire in a particular case, would

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work great injustice in many of the cases—they must be general.

As to the firm means which went into the buildings before the death of Daniel L., or in pursuance of the contracts made in his life-time, we are satisfied the conversion was complete, and the same rule will apply; we are inclined to the opinion, that such would be the case with regard to the whole amount expended in the completing the erections, if it were done according to the original plan and design, on the ground that his assent had been given before his death, to the conversion of the entire amount. But this last question may be reserved for the Chancellor, upon the coming in of the report, if desired. It may, perhaps, be worthy of more examination than we have been able to give it at this time.

The decree will be affirmed, and the case remanded for the account and further proceedings.

JOHN S. McNUTT v. SAMUEL McMAHAN.

1. **BILLS AND NOTES.** *Non est factum.* *Bill single, originally void. Re-delivery.* In order to bind a party on the ground of a re-delivery of a deed originally void, it must appear that by such supposed re-delivery the party has done some act equivalent to the execution of a new deed, or that by some act or declaration he has acknowledged and re-delivered a writing which was before impeachable and invalid, intending thereby to make it his deed. The action or declaration of the party must be unequivocal, clearly indicating the intention of the party to adopt the paper as his own, and to assume the liability it imposes.

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2. *SAME. Same. Same.* On the trial of an issue upon the plea of *non est factum*, it appeared that defendant had placed his signature and seal to a paper in blank as security for another which was afterwards filled up in the absence of defendant. That defendant afterwards called upon the party having custody of the paper, and asked permission to look at his "note;" that, after inspecting it, and taking a memorandum of the date and amount, he observed that he was bound for the principal in a large amount of money, and then returned the paper to the holder; and it is held, that this was not such an acknowledgment and re-delivery as would bind the defendant.
3. *CASES CITED.* *Turbeville v. Ryan*, 1 Humph., 118; *Smith et al. v. Dickinson*, 6 Humph., 261; *Mosby v. The State*, 4 Sneed, 829.

FROM SEVIER.

This action of debt is from the Circuit Court of Sevier county. At the July Term, 1858, before Judge TURLEY, verdict and judgment were for the plaintiff. The defendant appealed in error.

FLETCHER and TEMPLE, for the plaintiff in error.

J. P. SWANN and R. MCFARLAND, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

Samuel and Isaac McMahan brought an action of debt against the plaintiff in error, and one McTeer upon a bill single for \$604.30, dated the 5th of December, 1855, and obtained judgment. The case, as to McNutt, was tried upon a plea of *non est factum*. He moved for a new trial, which being refused by the Circuit Court, he filed his bill of exceptions, and has brought

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the case to this Court by an appeal in the nature of a writ of error.

It appeared in the proof that the bond in controversy, together with other bonds, had been signed in blank by McNutt, with his seal and signature, and that, afterwards, they had been filled up by one Bowerman, by writing the entire bond above his signature—he not being present, but some five miles distant. This was done about the time the bond bore date. It was proved by Samuel B. Henderson and others, that before the suit was brought, McTeer had failed in business, and that they informed McNutt of it, and that he spoke of being McTeer's security, and did not deny that he was his security, and asked if McTeer had lifted the notes; and being told he had not, he requested one of the plaintiffs to hold on until he could go to Knoxville and try to get a deed of trust of McTeer. And he also requested the witness, and one of the plaintiffs, to leave their notes at Samuel McMahan's house, so that, in passing, he could get a memorandum of the date and amount—the bonds not being then present.

The plaintiffs then proved, by Eliza Henderson, that early in January, 1857, she was at the house of Samuel McMahan when McNutt came there and inquired for his note, and asked to see it; that the wife of McMahan produced the bond in controversy, when he said, there is my note—there it is; and that he then read it, or looked at it, and took a memorandum from it, and then said he was in for McTeer to the amount of \$2,300, and was on his way to Knoxville to get a deed of trust, and handed the note back to Mrs. McMahan. It was further proved that McNutt, while in

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Knoxville, took the advice of counsel, for the purpose of resisting the collection of this and the other notes executed at the same time.

The counsel of McNutt asked the Court to charge the jury, that unless when the defendant McNutt handed the note to Mrs. McMahan, he intended *thereby* to become bound for it, it would not be a re-delivery; and that, if he only intended to restore to Mrs. McMahan the nominal custody and possession of the note, and to leave the rights of the parties unchanged, and as they were previously, then the transaction would not be a valid re-delivery. But the Court refused so to charge, and instructed the jury, that if the defendant returned the note to the wife of the plaintiff as his note, intending to be bound by it, this would be a valid delivery, and obligatory upon him. But that if the jury should find, from the proof, that the defendant only called for the note to take a memorandum of the date and amount, and returned it without intending to be bound by it, the mere fact of his having it in his hand, and returning it, would not bind him.

It is conceded, in argument here, by the counsel of both parties, that this bond, as to McNutt, was originally void: and that, unless he became bound by the transaction which took place with Mrs. McMahan, he is not bound at all.

The rule laid down in *Turbeville v. Ryan*, 1 Hum., 113, and followed by this Court in *Smith et al. v. Dickinson*, 6 Hum., 261, is, that to authorize the execution of a deed in the name of another, the authority must be by deed; and no previous parol assent, or subsequent adoption, will bind the party, unless it be ac-

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knowledge and re-delivered. The same rule is laid down in the late case of *Mosby v. The State of Arkansas*, 4 Sneed, 324.

Testing the case under consideration by this rule, we think the verdict of the jury wholly unsupported by the proof. It is most palpable that the defendant's object in visiting Samuel McMahan's house, was to get a memorandum of the date and amount of the bond, either with a view of getting a deed of trust of McTeer, or of resisting its collection by some supposed legal defence; and that in all that he did, from first to last, there was nothing that, in law, amounted to an acknowledgment and re-delivery of this bond.

If his object was to use his legal defences against it, then he could have no motive to re-deliver it, or in any way to bind himself in an engagement from which he was already absolved. If, on the other hand, as is most probable, he then supposed himself legally liable, why should he again acknowledge and re-deliver this deed. The idea of a re-delivery implies that the party should do something equal to the making of a new deed; that, by some act, or declaration, he should acknowledge and re-deliver a writing—which was before impeachable and invalid—*intending thereby to make it his deed*.

In this view of the case, we also think the charge of the Circuit judge to the jury was erroneous.

Reverse the judgment, and remand the cause.

A. M. Stone, Adm'r, v. Robert Duncan *et al.*

A. M. STONE, ADM'R, v. ROBERT DUNCAN *et al.*

1. CHANCERY. *Evidence. Effect of order pro confesso.* An order *pro confesso* against a defendant to a bill in chancery, has the effect of an answer admitting the allegations of the bill to be true.
2. *Set-off. Statute of limitations. Promissory note.* A debt barred by the statute of limitations cannot be allowed as a set-off, unless the bar of the statute is waived. If the claim relied on as a set-off, is spoken of in the record as a "note," it must be taken to have no seal; and, if barred by the statute of limitations, cannot be allowed.

FROM MARION.

This cause was heard before Chancellor VAN DYKE, at the September Term, 1858. The Court decreed for the complainant. The defendant appealed.

MINNIS, for the complainant.

PETER TURNEY, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The Chancellor's decree, in this cause, was right and should be affirmed.

The money loaned to the defendant Duncan, upon the state of pleadings in this case, must be taken to have been the money of Thompson Gardenhire, the intestate of complainant.

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The bill, as to Martha Meadow and Litton, is taken for confessed. This, as between *them* and *complainant*, establishes the title to the money to be in complainant. *Irby v. McKissack*, 8 Yer., 42; *Koen v. White's Heirs*, Meigs' Rep., 358. The case is to be treated as though they had answered and admitted the complainant's rights, as set up in the bill. This being so, the defendant, Duncan, cannot controvert the complainant's right to recover. He admits he owes the debt to some one; and complainant having established his right to it, is entitled to a decree. Meigs' Rep., 358.

The set-off claimed by the defendant was properly rejected by the Chancellor. He does not appear to have acquired any title to it, in what took place between him and Hargis. And, besides, it is spoken of as a "note," and must be taken to have no seal. *Walker et al. v. McConico et al.*, 10 Yer., 228. And he is barred by the statute of limitations. It was executed as early as 1845 or 1846, and cannot, as it appears in this record, be allowed against Gardenhire's estate.

Affirm the decree.

Reps Jones v. Daniel Jones.

REPS JONES v. DANIEL JONES.

MORTGAGE. *Parol defeasance of title bond, or other executory contract.*

It is well settled, that though a conveyance be absolute in its terms, it may be shown by parol proof, to be a *mortgage*. The same rule applies to a title bond, or other executory contract, and they may be shown, by parol proof, to be a *mortgage*.

FROM COCKE.

At the September Term, 1858, of the Chancery Court at Newport, Chancellor LUCKY pronounced a decree for the defendant. The complainant appealed.

SWAN and FLETCHER, for the complainant.

McFARLAND, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

The decree of the Chancellor in this cause should be affirmed. As to the three shares in the Daniel Jones, Sr., tract of land, purchased by complainant of the defendant, there is no controversy. That was an absolute purchase, and is so admitted in the bill and answer, and so shown to be in the proof. The decree as to that, is conceded to be proper. The contest here, is as to forty-two acres of the purchase made by Daniel Jones, at the clerk and master's sale, in the year 1852. As to that, complainant insists he was a joint purchaser with de-

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defendant at the master's sale, and was to have that much of the whole purchase out of a particular portion of the tract. The defendant, in his answer, denies this, and claims that he made the purchase in his own name and for himself; that complainant was desirous of purchasing of the heirs of Reps Davis, a tract of land in the lower end of "Beech Bottom," adjoining the lands he already owned, to make his farm complete; but that it was probable he would not be able to effect this purchase for some time, and in the meantime, he would not have land enough to employ his force upon in the bottom; that the defendant could very well do without the use of a part of the land he had purchased at the master's sale for a time, and would have to borrow a part of the money to pay for it; and that, therefore, it was agreed between them, that complainant should advance for defendant, the money to pay the clerk and master for the forty-two acres of land at \$14.60 per acre; and should have the use of the land for the interest of the money, and when defendant was able to refund it to complainant, he was to do so, and have his land back; and that this arrangement was for the accommodation of both parties. This view of the case is sustained by Thomas M. Jones, a brother of the complainant and defendant, in his deposition, and by other evidence in the record. Thomas M. Jones, on the 1st day of January, 1853, drew up the writing between them, in which no distinction is made between the three shares in the Daniel Jones, Sr., tract of land, and the forty-two acres. The writing, as to both interests is, in its terms, an absolute sale, and the right to redeem, or have back the forty-two acres by the defendant, is no where men-

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tioned in it. But Thomas M. Jones, the draftsman, proves that he intended to make the distinction, and supposed he had; that he wrote it under directions from complainant, and when defendant come to hear it read, he objected to executing it, because the true contract between him and complainant was not stated in it, it not showing at what time he was to have the forty-two acres back, or that he was to be allowed to redeem it. To this Thomas M. Jones replied, that it was not very well drawn, but that the contract between them was well understood, that they were brothers, and would do right, and there could be no difficulty between them; and then Daniel Jones signed the contract. It is true, that the clerk and master proves, that though the sale was made to Daniel Jones alone, yet he regarded complainant as being jointly interested with him in the purchase; that it is proved, and the answer so admits, that complainant advanced the money to the master to pay for the forty-two acres, that complainant has possessed and cultivated it ever since, that he had its lines run and marked, and defendant disputed with him as to the lines, and got back of him a small piece of the land for a barn site, and frequently, in a general way, said complainant was to have a part of the land. Yet all this is not inconsistent with the position taken by defendant in his answer, for complainant was to have the land for an indefinite time, and was to possess and cultivate it, until the defendant was able to redeem it. And the brothers might very well examine the land together, prior to the master's sale, with a view to carry out the arrangement proved by Thomas M. Jones. Jane Nolin, a sister of the parties, sustains the evidence

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of Thomas M. Jones. And it is very clear, when we examine the entire record, that the defendant did not understand himself as having parted absolutely with this land. And though many of his acts and declarations, when taken alone, would seem to show that he had; yet these must be controlled by the evidence of Thomas M. Jones, the witness who drew the contract between the parties; and who, alone, seems to know how the disputed facts between these two brothers really are. The weight of the evidence is, we think, with the defendant. And the law is well settled, that though a conveyance be absolute in its terms, it may be shown, by parol proof, to be a mortgage. And we can perceive no valid reason, why the same thing may not be done in the case of a title bond, or other executory contract. The Chancellor held the instrument a mortgage, and we affirm his decree.

JAMES VAUGHAN v. ROBERT CRAVENS *et al.*

1. **LEASE.** *Tenants in common. Contract.* A contract made by one tenant in common, without the concurrence of his co-tenants, for a lease of the lands jointly owned by them, is not binding upon such co-tenants.

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2. *SAME. Improvements.* A party put in possession of lands under a void lease, cannot recover for improvements made thereon, unless they *enhance* the value of the land.

FROM HAMILTON.

This cause was tried in the Chancery Court at Harrison. A decree was rendered at the July Term, 1858, for the defendants. VAN DYKE, Chancellor, presiding. The complainant appealed.

HOPKINS, for the complainant.

BURCH, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The bill in this case, is filed to recover from the defendants, compensation for certain improvements, which the complainant alleges he made upon their lands under a lease which was void, because not in writing. The Chancellor dismissed his bill, and he has appealed to this Court. The lands were used for mining purposes, in getting coal from certain ore beds.

The defendant, Cravens, owned one-sixteenth of the lands, as a tenant in common, with the other defendants, who owned the residue. And it is very clear, from this record, that whatever contract complainant had, was with Cravens, and did not bind his co-tenants. It is denied in the answers that there was any lease. And Cravens, the only defendant who knows anything on the subject, says the contract was, at first, only to

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make a certain road, for which complainant, at once, was paid in coal *then* dug by defendant, and received by complainant; and that complainant was allowed, afterwards, only to dig out of a certain pit, which defendant had opened, under which he, without authority, and in defiance of defendant's wishes, went on and done the work at another place, for which he now asks compensation.

It is not very clear what the contract was, and the facts, as to this matter, we incline to think are with the defendants.

But be all these things as they may, the weight of the proof is, that the improvements made by complainant, have not *enhanced* the value of the land; while on the other hand, he committed great waste in cutting timber, &c. Upon the entire record, complainant is entitled to no relief, and we affirm the Chancellor's decree.

JOSHUA GUINN *et al.* v. B. F. LOCKE *et al.*

1. **REDEMPTION.** *Fraud.* If the debtor is prevented from redeeming his land, by the fraud and artifice of the purchaser, until the expiration of the time allowed by law to redeem, such omission of the debtor will not prejudice his rights; and a Court of Equity will permit him to redeem.
2. **SAME.** *Mortgage.* If a party purchase, or redeem land as the agent, or for the benefit of the debtor, the relation of mortgagor and mortgagee is thereby established. And this relation may be shown by parol, although the purchaser may hold by a sheriff's deed, or other absolute conveyance.

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3. *SAME. Same. When subject to redemption in the hands of a third person.* If a third person takes a conveyance of the land thus subject to redemption, in payment of a pre-existing debt, or with actual notice of such equity, it may be reached, in the hands of such third party, by the redeeming debtor.
4. *SAME. Same. Tender. Payment of money into Court.* Where, by the proof, the relation of mortgagor and mortgagee is established, it is not necessary to bring the money into Court. In such case, if, upon an account, the mortgagor cannot pay the balance found due, the mortgaged estate is sold for the payment of the debt, and the surplus paid to the mortgagor.

FROM M'MINN.

Upon the hearing, Chancellor WILLIAMS decreed for the complainants. The defendants appealed.

COOKE and BROWN, for the complainants.

TREWHITT, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

We are content with the decree of the Chancellor in this cause, and affirm it.

The record presents a case where the defendant, Locke, obtained of Bartholomew Guinn, the father of complainants, a tract of land, worth from \$1,000 to \$1,200, at, perhaps, less than one-third its value. It was, to be sure, purchased by Locke and McCorkle at execution sale, and a sheriff's deed taken. But it is manifest, from the pleadings and proof, that as to McCorkle's share of the purchase, it was redeemed of him, before the time allowed by law for redemption

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had expired. To effect the redemption, Guinn paid a part of the money, and Locke advanced the balance for him, and we are satisfied the redemption was for Guinn who became Locke's debtor for the sum he advanced, as upon a loan. Locke managed it for Guinn, as his agent; but instead of taking the deed of McCorkle to Guinn, or to himself for Guinn, he caused it to be made to Sharp, his brother-in-law.

And, as to Locke's part of the purchase, we are satisfied he misled and deceived Guinn, who was a confiding old man, and induced him not to redeem, under assurances that he would hold the land for him, and that he might pay him the money at his convenience, until the time allowed by the statute to redeem had passed.

He and Sharp now set up to be the owners of the land. But it would be unjust and inequitable to permit them to hold it. We need go no further than to the cases of *Smart v. Waterhouse*, 10 Yer., 94-105, and *Belcher v. Belcher*, 10 Yer., 121, to find authority to warrant us in giving relief. In the former case it was held, if a widow is prevented from dissenting from her husband's will by the artifice of the executor, until the time of six months, within which the dissent ought to be entered, has elapsed, such omission will not prejudice her.

Absolute deeds may be turned into mortgages by parol proof; and it may be shown, that though the party holds by a sheriff's deed, or other absolute conveyance, yet that he purchased, or redeemed, as the agent of the debtor, or for his benefit, and the relation of mortgagor and mortgagee will thereby be established.

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Such proof has never been regarded as opposed by the statute of frauds. *Kennedy v. Howard*, 6 Hum., 64; 8 Hum., 378; 8 Hum., 460; 10 Hum., 349.

The defendant, Sharp, is not an innocent purchaser, because he took the conveyance for a pre-existing debt only by quit-claim, and, as we think, had actual notice of the complainant's equities.

The defendants are not protected by the statute of limitations for more than one reason. It is enough to say that Guinn and his children held possession of the land until the fall of 1846, or even longer, and that seven years had not elapsed from the time they were turned out of possession to the filing of the bill and amended bill.

It was not necessary, in a case like this, to bring the redemption money into Court. The case does not stand strictly under the redemption laws of the State; but from the facts, the defendants, Locke and Sharp, are converted into mortgagees, and must account as such. The practice, in such cases, has been, where the mortgagor could not pay the balance found due the mortgagee, upon the coming in of the report, to decree a sale of the mortgaged estate, and pay him out of the proceeds, paying the surplus to the mortgagor.

Affirm the decree.

ELIZA HOCKADAY v. W. L. WILSON.

REPLEVIN. *Jurisdiction of justices of the peace. Acts of 1851 and 1854.*

By the act of 1851, ch. 32, jurisdiction is conferred upon justices of the peace in actions of replevin, if the amount in controversy does

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not exceed fifty dollars. This act is not repealed by the act of 1854, ch. 60. Both acts may well stand together, and implied repeals are not to be encouraged.

FROM JOHNSON.

Action of replevin, commenced before a justice of the peace. It was appealed to the Circuit Court, where there was judgment for the plaintiff, at the November Term, 1857, PATTERSON, Judge, presiding.

NELSON, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

This is a suit by warrant in replevin, before a justice of the peace, issued the 10th of October, 1856. And the only question is, whether the justice had jurisdiction? And we think he had. By the act of 1846, ch. 65, the Circuit Courts alone had jurisdiction of all suits in replevin, however trivial the cause of action. This defect was soon perceived by the Legislature, and remedied by the act of 1851, ch. 32, and jurisdiction conferred on justices of the peace in actions of replevin, where the amount did not exceed \$50.

This act is not repealed by the act of 1854, ch. 60, and the jurisdiction of the justice of the peace remains undisturbed. The only object of this last-mentioned act was to so amend the act of 1846, as to authorize the action of replevin to be instituted in the Courts of the county in which the goods and chattels sued for "may

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be found." It had reference only to the Circuit Courts, and the jurisdiction of justices of the peace was not in the least affected by it.

The act of 1851 and 1854 may well stand together, and implied repeals are not to be encouraged. 2 Meigs' Dig., 972-3; *Cate v. The State*, 3 Sneed, 120.

Affirm the judgment.

JOHN M. STANLY v. JAMES CRIPPIN.

1. NEW TRIAL. *Judgment must be shown to be erroneous. Pleading.* A judgment of the Circuit Court will not be reversed, by the Supreme Court, unless it is clearly shown to be erroneous. It is not sufficient that it may not appear to be right. It must be shown to be wrong. Substantial errors must be pointed out, by the party complaining of the judgment.
2. SAME. *Same. Same. Case in judgment.* In this case there is no bill of exceptions, no declaration and plea. The parties appeared and had several continuances. A jury was duly sworn to try the issue, and, after a trial of several days, returned a verdict against the plaintiff in error, upon which the Court gave judgment. A motion for a new trial was made and overruled. An appeal in the nature of a writ of error was taken. Held, that since the act of 1852, the objections to the judgment must be regarded as matters of form, and not of substance, and are not sufficient to authorize a reversal.

FROM KNOX.

Ejectment. Judgment for the plaintiff, at the June Term, 1857. SWAN, J., presiding.

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LYON and MAYNARD, for the plaintiff in error.

HALL, TRIGG and TEMPLE, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

In this case there is no bill of exceptions, and no declaration or plea. The action is ejectment, and we find in the record, the summons and bond for costs, and such reference to the declaration as leaves little room to doubt that it once existed. The parties appeared, and after several continuances, the record shows, that a jury was duly sworn to try the issue joined between them, and after a trial of several days, rendered a verdict, in due form, against the defendant below, upon which the Court gave judgment; a motion for a new trial being overruled. He has brought the case to this Court by an appeal, in the nature of a writ of error, and now asks a reversal of the judgment.

But we cannot reverse a judgment of the Circuit Court, unless it is clearly shown to us to be erroneous. It is not enough, that it may not appear to be right. It must be shown to be wrong. Since the passage of the act of 1852, ch. 152, §§ 4 and 5, the objections to this judgment must be regarded as matters of form and not of substance. We must presume the Circuit Judge acted right, and can only set aside what he has done, where the party complaining shows us substantial errors in the record. How do we know upon what facts or reason the Circuit Judge acted, in permitting this judgment to stand; and we are bound to suppose, in the absence of anything to the contrary, that he had

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some valid reason. It is true, that in an incidental remark, in the opinion of the Court, in *Wolfenbarger v. Standifer*, 3 Sneed, 659, a different doctrine is intimated; but the case did not go off on that point, and this question was not then considered by the Court. We affirm the judgment, and remand the cause to the Circuit Court, to the end that the judgment of that Court may be executed.

STEPHEN MCCASLAND v. ABRAHAM CARSON *et al.*

FRAUDULENT CONVEYANCES. *Debtor and Creditor.* The mere fact that a credit of one, two and three years is given upon a sale of land by one indebted, will not of itself, render such sale fraudulent in law.

FROM BRADLEY.

From the Chancery Court at Cleveland. At the February Term, 1857, decree by Chancellor VAN DYKE, for complainant. Defendant appealed.

J. H. GAUT, for complainant.

G. W. ROWLES, for defendants.

WRIGHT, J., delivered the opinion of the Court.

We have been unable to find any ground upon which the decree of the Chancellor, in this cause, can stand.

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The defendants, in their answers, deny positively and with great particularity, the fraud charged in the bill. Interrogatories are put to them, and they are made witnesses, and answer in detail. They show that they purchased the land in dispute, of their father, in 1846, took deeds for it, had them duly proved and registered, and that they paid the purchase money, which was its full value. That they took immediate possession; have made lasting and valuable improvements; and have lived upon and held the land ever since as their own, and aver their ability, at the time, to purchase and pay for it. They state, in detail, when and how they paid for it, naming sundry creditors of their father, to whom they had made payments by his direction.

Their answers are fully sustained by the proof. And without reviewing it, we are satisfied that these purchases were fair, and free of fraud in *fact*. The complainant has failed, in any way, to weaken these answers, or to lessen the force of the defendants proof.

But it is argued, that these purchases were made upon a credit of one, two and three years, in instalments, and that such delay in the payments, of necessity, hinder and delay the creditors of Abraham Carson, and render the deeds fraudulent *in law*.

This position cannot be maintained.

It is not pretended that these credits are excessive, or unreasonable in fact, nor could it be so insisted. It is true, that in *Mitchel v. Beal*, 8 Yer., 134, it was decided, that a *deed of trust* which included all the property of the debtor, which was of twice the value of the debt secured, and the time of indulgence was three years, with no annual payments stipulated for, and the

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possession and use of the property, for that time, expressly reserved to the debtors, and put beyond the control of the trustees; and power given them to sell it on a credit of three years, with no other restriction, but that they should pay the proceeds to the trustees, was held fraudulent. But that case has no application to this. It was afterwards reviewed and examined in *Bennett et al v. The Union Bank et al*, 5 Hum., 612, where it was decided, that a *deed of trust*, in which indulgence was given to the debtor, in instalments of from one to five years, was not necessarily fraudulent.

The case of *Hendricks v. Robinson*, 2 Johns. Ch. Rep., 299, to which we have been referred, was one of *actual fraud*, and in its facts, entirely unlike this.

It is sufficient for us to say, that these are *absolute sales*, in which, in our judgment, there is nothing unfair or unusual, and that the purchase money has actually been paid and applied, most, if not all of it, to Abraham Carson's debts, prior to the filing of complainant's bill.

Some use is sought to be made of the declarations of Abraham Carson, that he did not expect to pay the debt to complainant; but, if made after these sales, situated as the case is, they would be inadmissible evidence against the defendants; and if admissible and received, could not change the result.

Decree reversed, and bill dismissed.

Abram (a man of color) v. T. J. Johnson *et al.*

ABRAM (A MAN OF COLOR) v. T. J. JOHNSON *et al.*

1. **SLAVERY.** *Emancipation.* At common law no deed or writing of the owner was necessary to give the slave his right to freedom. Acts *in pais*, from which freedom might be implied, have been held sufficient, and as between the master and the slave the same rule now prevails in this State, though the right to freedom will remain inchoate until the State gives her assent.
2. **SAME.** *Same.* *What an act of emancipation.* The presentation by the master of a petition to the County Court for the liberation of his slave, and giving bond to indemnify the county, gives the most decisive evidence of the wish and intention of the master to emancipate, and is in itself a complete act of freedom on his part. The slave becomes at once invested with his right to freedom; and a mortgage of the slave made afterwards, with a full knowledge of the facts on the part of the mortgagee, will not be allowed to defeat that right, but it may be asserted and decreed upon the terms and conditions prescribed by the statutes upon the subject.

FROM CLAIBORNE.

This was a bill for freedom, filed in the Chancery Court at Tazewell. At the December Term, 1857, Chancellor LUCKY dismissed the bill. The complainant appealed.

HEISKELL and NETHERLAND, for the complainant.

MAYNARD and EVANS, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The record in this case shows that complainant is entitled to his freedom.

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The rules of law applicable to emancipation cases are well settled in Tennessee. No deed, or writing of any kind, was necessary at the common law for the purpose of parting with the master's right. Acts *in pais*, from which freedom might be implied, have been held sufficient. As between master and slave, the same rule prevails in this State, though the right will remain inchoate until the State gives its assent. 1 Meigs' Dig., 455, 456; 8 Hum., 185. The presentation of the petition to the County Court at Tazewell by Levi Grier, and giving bond to indemnify the county—as was held in *McCullough v. Moore*, 9 Yer., 305—gave the most decisive evidence of his wish, and was, in itself, without recurring to the other evidence in the record, a complete act of freedom, on his part. It can make no difference that this was not at a Quarterly Term, or that the requisite number of magistrates was wanting, if the fact be so. This was intended for the protection of the public, and not to guard Levi Grier's rights. 9 Yer., 307.

Nor can it make any difference that he had, a few days before the petition, conveyed complaint to Wilson Grier, or that it was done to evade the payment of debts. The complainant was not a party to this fraud, if any existed, and it is manifest the conveyance was intended the more effectually to secure his freedom. Wilson Grier is a party to this suit, and in his answer shows this, and submits that complainant is entitled to freedom. A few days after the conveyance, he reconveyed him to Levi Grier, who is now one of complainant's sureties on the bond for costs in this cause. It was held in *Lewis v. Simonton*, 8 Hum., 185, that the

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owner need not present the petition, so his assent is given in any other way.

The creditors of Levi Grier, if there be any, are not parties here, and we cannot notice them. The question is *one alone* between complainant and defendant, Johnson. And he can have no right to hold him in slavery. According to his answer and the proof, he only holds him in mortgage to secure \$330, and complainant is worth greatly more than this.

He took a conveyance of complainant, after the petition had been presented in the County Court and bond given, and after Wilson Grier's reconveyance to Levi, and with full notice of complainant's right to freedom.

The said Johnson was the clerk of the County Court of Claiborne, and there are strong reasons for believing that a faithful record of the action of the Court upon the petition was not kept.

It is proved, beyond doubt, that a bond was given to indemnify the county, and it is probable that nine justices were present, and gave the State's assent; yet nothing can be found but the petition. Johnson told complainant not to be uneasy, that he would write out his free papers the first opportunity, and that he was then as *safe* as if he had them.

An account must be taken of the mortgage debt between Levi Grier and Johnson, in which he will have interest upon his debt, and Grier will be allowed credit for his payments; and if any balance remains, the hire of complainant which has already accrued, will be applied to its extinguishment. The defendant, Johnson, will be charged with hires received before com-

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plainant went into the receiver's hands. And if any balance shall yet remain, complainant will be hired to meet it.

The complainant must be sent to the Western Coast of Africa, and a decree for his freedom will be drawn upon the terms and conditions laid down in the act of the 24th of February, 1854, ch. 50. (Acts 1853-4, page 121,) 1 Sneed., 577.

We reverse the decree of the Chancellor, and remand the cause to the Chancery Court at Tazewell, to the end this decree may be executed. Defendant Johnson will pay the costs.

SAMUEL S. FINLEY v. ALFRED KING.

PRINCIPAL AND SURETY. *Levy. Certiorari and supersedeas.* Where an execution has been levied upon enough of the principal's goods to satisfy the debt and costs, it is of itself a satisfaction, so far as the surety is concerned; and if such levy be abandoned, and the surety's goods be levied upon, he is entitled to his discharge upon writs of *certiorari* and *supersedeas*, showing his suretyship by proof.

FROM HAMILTON.

This was a petition for *certiorari* and *supersedeas*, filed in the Circuit Court of Hamilton County. At the July Term, 1858, Judge GAUT, dismissed the petition. The petitioner appealed.

Samuel S. Finley v. Alfred King.

WELCKER and KEY, for the petitioner.

J. H. GAUT, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

The Circuit Judge erred in dismissing the petition of Finley for writs of *certiorari* and *supersedeas*. He avers that he is the *security* of Rogers in the note and judgment in favor of King, and that an execution had been issued and levied on thirteen head of cattle, two horses, and a wagon, as the property of Rogers, the principal in the debt, of value sufficient to pay it; but that no sale had been made of it, or credit given on the execution for said property; and that, *after this levy*, an alias execution was issued, and had been levied on the property of petitioner, disregarding the previous levy.

If this petition be true, Finley is discharged. No principle is better settled than that, if the personal estate of the principal debtor, of value sufficient to pay the debt, is levied on, the surety is discharged, and the debt, as to him, satisfied. And he may show that he is surety by proof. 1 Meigs' Dig., 517, 518; *Clark and Nance v. Bell*, 8 Hum., 26.

If we go out of the petition, as it seems we may do, and look at the executions and levies, they sustain Finley's petition. 8 Hum., 708; 1 Sneed, 290.

This is a very different case from an attempt on the part of the surety to force the officers to first exhaust the property of the principal debtor, under the act of 1843, ch. 32. (Nich. Supp. 279,) 11 Hum., 445.

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Here he stands on the levy on the principal's property, and the satisfaction of the debt by force of the levy.

Reverse the judgment, and remand the cause for further proceedings.

JOHN HARREL v. THE STATE.

WITNESS. *Competency on account of religious belief. How tested. Practice.* In order to test the competency of a witness on account of his religious belief, he may be either interrogated personally concerning it, or his declarations to others upon the subject, may be shown. The question, whether or not such declarations have been correctly understood and reported, will, of course, be open to proof of a like character.

FROM M'MINN.

The prisoner was indicted in the Circuit Court of McMinn county, for receiving goods, knowing them to have been stolen. At the December Term, 1857, before Judge GAUT, he was convicted and sentenced to three years confinement in the penitentiary. He appealed in error.

BROWN and COOK, for the prisoner.

HEISKELL and REESE, for the State.

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McKINNEY, J., delivered the opinion of the Court.

The plaintiff in error was convicted upon a charge of receiving stolen goods, and sentenced to three years confinement in the penitentiary.

The prosecutor, Stephens, was examined on the trial, and was the principal witness for the State.

For the purpose of excluding said witness, on the ground of incompetency, from want of religious belief; it was proposed, on behalf of the defendant, to prove, that, within less than four months from the time of the trial, said Stephens "had solemnly declared, that he did not believe the Bible was true; that he did not believe in the existence of a God; that he did not believe that man had any soul; that he was like the beasts; that his breath was his soul, when you stopped that, his soul was destroyed, and that was the end of man." The Court refused to admit this evidence; but stated, that the defendant might inquire as to the "general religious reputation" of Stephens; or might call Stephens, and interrogate him as to his religious belief; the defendant's counsel declined to do either.

It is admitted that the sentiments imputed to Stephens, if really entertained, rendered him incompetent to testify as a witness; and the only question is, as to the mode of proof. Upon this point, a difference prevails in practice. Mr. Greenleaf states the ordinary mode of showing this objection to the competency of a witness is, "by evidence of his declarations, previously made to others;" vol. 1, sec. 370, and note 2. And according to some of the authorities referred to in the note, it is not admissible to inquire of the witness as to

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his religious belief. On the other hand, Mr. Starkie lays it down, (Vol. 1, p. 121) that, "Before a witness takes the oath, he may be asked whether he believes in the existence of a God, in the obligation of an oath, and in a future state of rewards and punishments; and if he does not, he cannot be admitted to give evidence."

We have held recently, in a case not reported, that the party seeking to exclude a witness on this ground, may adopt either mode of proof; and we adhere to this determination as the better practice. If the witness really disregards the obligation of an oath, it would seem to be neither safe, nor consistent, to resort to his examination.

If he has voluntarily avowed his disbelief, we perceive no reason why this should not be proved in the same manner as any other fact. The question, whether his declarations in regard to his faith have been correctly understood, as represented; as also the question, whether his opinion has undergone a change, will be open to proof of a like character.

In this view, his honor erred in excluding the evidence offered. But, in the instructions to the jury, we think there is no error.

Judgment reversed.

W. P. Crippen, Adm'r, v. Sarah P. Crippen *et al.*

W. P. CRIPPEN, ADM'R, v. SARAH P. CRIPPEN, *et al.*

1. PRACTICE. *Service of process upon infant defendants.* In a proceeding by an administrator, to sell land or slaves for the payment of debts, there must be service of process upon infant heirs. The answer of the guardian, *ad litem*, will not give jurisdiction.
2. SAME. *Administrators and executors. Sale of slaves to pay debts.* *Act of 1827, ch. 61, § 2.* A bill or petition by an administrator to sell slaves for the payment of debts, must be sworn to.
3. SAME. *Same. Same. Act of 1789, ch. 23, § 4.* Upon a bill by an administrator, to sell land or slaves for the payment of debts, an account should be had with the administrator, exhibiting the full condition of the administration as to the assets received, or which should have been received; and of all debts and charges upon the estate paid by him, and of all outstanding debts established by legal proofs, before a decree of sale is granted; and only so much should be sold as may seem necessary to pay what is legally due under said account.

FROM KNOX.

This was a bill filed by the complainant as administrator of the estate of John F. Crippen, deceased, to sell the land and slaves of said estate for the payment of debts. At the July Term, 1858, Chancellor LUCKY gave a decree authorizing the sale, from which the widow and heirs appealed.

TRIGG, TEMPLE and HALL, for complainant.

BAXTER and ARNOLD, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

This record does not come collaterally, but directly,

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before us upon a writ of error. The land and slaves have not been sold, and there is no question with the purchaser. Matters of error, as well as of jurisdiction, are open for decision.

The decree of the Chancellor is erroneous.

1st. James L. Crippen, one of the infant heirs of John F. Crippen, deceased, was not served with process, and is not before the Court. The answer of the guardian *ad litem* does not give the Court jurisdiction.

2d. The bill or petition being for the sale of slaves, to pay debts, should have been sworn to, under the act of 1827, ch. 61, § 2, (C. and N. Rev., 83,) 1 Meigs' Dig., 29.

3d. Before a decree was had to sell land or slaves, to pay debts, there should have been an account with the administrator of the assets of the estate received by him, or which he ought to have received, and of such *bona fide* debts and charges upon the estate as he may have paid; so as to enable the Court to have proper evidence before it of the necessity of the sale of the slaves or lands to pay the remaining debts.

4th. There should also have been an account and report as to the remaining *bona fide* debts and charges outstanding against the estate. And these should have been established, by proper evidence, to the satisfaction of the Chancellor, rejecting all such claims as appeared to be involved, or barred by the act of 1789, ch. 23, §. 4, (C. & N. Rev., 75).

This was the more especially necessary in this case, because it appears that nearly four years have elapsed since the grant of administration; and this act of Assembly is imperative upon the administrator and the

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Courts; and the heirs and distributees are entitled to the full benefit of it, in order to protect the land and slaves inherited by them from their ancestor against unjust demands.

The Court should sell only so many of the slaves, or so much of the land, as may be necessary to pay the debts; and to act intelligibly, it is manifest they must first be ascertained.

We reverse and set aside the decree of the Chancellor, and remand the cause to the Chancery Court, for such further proceedings as may be proper in the case. [This reversal is not intended to disturb the decree or proceedings under the cross-bill.

JOHN JANEWAY v. THE STATE.

1. **CRIMINAL LAW. Indictment.** The objection, that two counts of the indictment, the one charging a larceny of the goods and the other a receiving of the goods knowing them to have been stolen, are repugnant, comes too late after verdict.
2. **EVIDENCE. Witness.** Where a witness does not recollect having said that which is imputed to him, it is competent to prove that he did say so, provided it be relevant to the matter in issue.

FROM CLAIBORNE.

The prisoner was indicted in the Circuit Court of Claiborne county for grand larceny. At the January

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Term, 1857, before Judge TURLEY, he was convicted and sentenced to suffer confinement in the penitentiary for the term of three years. He appealed in error to this Court.

MAYNARD, TRIGG, and TEMPLE, for the prisoner.

HEISKELL, for the State.

McKINNEY, J., delivered the opinion of the Court.

The indictment in this case contains four counts. In the first two counts, the prisoner is charged with having stolen "one bank note for the payment of one hundred dollars and of the value of one hundred dollars." In the other counts, he is charged with having received said bank note, knowing it to have been stolen. A general verdict of guilty, on all the four counts, was found by the jury, upon which the Court rendered judgment.

The prisoner moved in arrest of judgment, and also for a new trial; both of which motions were overruled.

Several errors are assigned upon the record. First. It is insisted that the charges in the indictment, of stealing the bank note, and of receiving it, knowing it to have been stolen, are repugnant and self-contradictory; and that for this reason the judgment ought to have been arrested. Whatever consideration this objection might have been entitled to, if taken in a different form and at a previous stage of the prosecution, we think it is not available after verdict.

Second. It is said the Court erred in excluding evi-

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dence of a statement made by Lewis, the prosecutor; from whom the bank note is charged to have been stolen, and who was examined as a witness for the State. Among other controverted matters in the case, a question seems to have been made on the trial, as to the *place* where the bank note was lost or taken from the possession of Lewis—whether in Tazewell or at McBee's—a place several miles from Tazewell. It was proved by a witness for the defendant, that, on the day after the note was lost or stolen, he saw Lewis, the prosecutor, in Tazewell, "hunting something very carefully, between Buchanan's grocery door and where he had hitched his horse." And it was then proposed to prove by said witness, "that Lewis said, at the time, that he was hunting a \$100.00 bill which he had lost the night before; that he had had it in his fingers in the grocery last night, and had not seen it since."

Lewis had been re-called and interrogated directly, whether he had made the foregoing statement, at the time and place mentioned; and his answer was, that "he did not recollect, he might and he might not." The Court held the proposed evidence of Lewis's statements to be inadmissible, because Lewis had not *denied* making such statements.

The question is, did the Court err in thus ruling? It will be observed that the exclusion of the evidence was not upon the ground that it was collateral or irrelevant to the issue, but simply because the witness, not recollecting whether or not he had made the statement, had not *denied* doing so. We do not perceive the principle upon which this distinction rests. If the evidence was at all relevant to the issue, as tending in any degree to

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establish some material fact, we are at a loss to see why the failure of prosecutor's memory as to whether or not he had made the statement, should be allowed to deprive the defendant of the benefit of the testimony. If the sole object of the evidence offered had been, to discredit the prosecutor by his own contradictory statement on a former occasion, the view of the Circuit Judge would have been more plausible; though, even then, we incline to the opinion that it could not be maintained. But regarding it as evidence which might aid in establishing a material fact in the case, that is, whether the bank note was lost or taken from the possession of the prosecutor at Tazewell, where the prisoner was not present, or at McBee's, where he was present, we think its rejection by the Court was error. The case of *Crowley v. Page*, 7 C. & P., 789, cited in note to sec. 449, 1 Greenleaf's Ev., is directly in point. That case decides, according to the note, that if the witness does not recollect having said that which is imputed to him, evidence may be given that he did say so, provided it be relevant to the matter in issue.

Upon this point the judgment must be reversed. We do not deem it necessary to notice the other supposed errors in the record, as, if they are well assigned, they may be obviated on another trial.

Judgment reversed.

John Sellars v. James M. Kinder.

JOHN SELLARS v. JAMES M. KINDER.

SEDUCTION. Evidence. The father's claim for damages for the seduction of his daughter, and the allowance made under the bastardy laws to the daughter for the support of the bastard child, are separate and distinct things. The one cannot be used as a bar to, or in mitigation of the damages justly arising under the other. Thus, in an action by the father for the debauching of his daughter, it is error to permit a receipt for the sum paid by the defendant to the daughter, under the bastardy allowance for the support of the child, to be read in evidence, when the plaintiff was in no way connected therewith, although such receipt purported to be in full acquittance of all claim for damages on account of the seduction.

FROM GRAINGER.

This action on the case is from the Circuit Court of Grainger county. At the December Term, 1857, before Judge TURLEY, verdict and judgment were for the defendant. The plaintiff appealed in error.

SHIELDS, for the plaintiff.

FLETCHER and J. R. COCKE, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

This was an action on the case brought by the plaintiff in error for the seduction of his daughter, on the trial of which, verdict and judgment were rendered against him. His motion for a new trial being overruled, he filed a bill of exceptions, and has appealed in error to this Court.

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The defendant pleaded not guilty and accord and satisfaction, upon which the plaintiff took issue. The latter plea was not sustained by the proof.

It appeared in evidence, that the defendant, on the proceedings and application of Sarah M. Sellars—the debauched daughter—in the County Court of Grainger county, had entered into bond and security that the bastard children should not become a county charge.

This appears to have taken place on the 7th of July, 1857. How long this proceeding on the part of the daughter, to have the defendant convicted as the father of her children, had been pending in the County Court, does not appear in the record. But on the trial in the Circuit Court, the defendant read in evidence a receipt executed by Sarah M. Sellars to him, bearing date of the 19th of May, 1857, in which she acknowledged the payment to her by Kinder of \$90, in consideration of all damages, either at law or in equity, which she had sustained in the way of sickness, loss of character, loss of time, loss of charges, or other special or general damages, on account of the bearing, birth, and raising of the two male children—named Enoch Tilman and Enos Tilford—of which the defendant was the father; and she waived and released any and all right or power which she had, or might have, to bring any suit or suits against the defendant because of his being the father of said children. To this receipt the plaintiff was no party, and the proof failed to connect him with it in any way. The Circuit Judge, in his charge to the jury, permitted this receipt, and the payment of the \$90, to go in mitigation of damages. This was error. No two things can well be more distinct than the father's claim for

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damages for the seduction of his daughter, and the allowance made the mother for the support and maintenance of her bastard children. The one cannot be used as a bar to, or in mitigation of the damages justly arising under the other. Whether we regard this receipt as a settlement of the allowance due the mother under the bastardy acts, or of any other claim which she might be supposed to have against the defendant, it was alike inadmissible and irrelevant against the claim of the plaintiff for damages.

Reverse the judgment, and remand the cause for a new trial.

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FORCIBLE ENTRY AND DETAINER. *What necessary to authorize the action.* In order to maintain the action of forcible entry and detainer, it is not necessary that actual force should be shown. The law implies force in every unauthorized entry upon the premises of which another is in the peaceable possession, and in every unauthorized obstruction of such possession. Thus, the action may be maintained where it appeared that the plaintiff was in the peaceable possession of the premises and had erected an enclosure thereon, and the defendant, against the will, and in spite of the remonstrances of the plaintiff, came upon the premises and erected an enclosure around that of the plaintiff, although he did not remove any part of the plaintiff's enclosure, or otherwise disturb the same.

FROM JEFFERSON.

This action of forcible entry and detainer is from the Circuit Court of Jefferson county. At the April

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Term, 1858, before Judge TURLEY, verdict and judgment were for the defendant. The plaintiff appealed in error.

J. P. SWANN, for the plaintiff.

———, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an action of "forcible and unlawful entry and detainer." It appears from the bill of exceptions, that both parties set up claim to the premises in dispute, under conflicting titles. And it seems that each desired, by his own act, to avail himself of the supposed advantage of an actual possession.

In the spring of 1856, the plaintiff made a small enclosure of perhaps less than half an acre, which, in the spring of 1857, he sowed in oats; and shortly thereafter, the defendant made an enclosure of several acres, which entirely surrounded the smaller enclosure of the plaintiff. And the question is, whether, upon this state of facts, the action can be maintained. His honor, the Circuit Judge, instructed the jury, in substance, that if no actual entry had been made by the defendant into the plaintiff's previous enclosure, and no violence, or threats tending to excite apprehension of danger to the plaintiff, if he continued to occupy his enclosure, had been used by the defendant, and the plaintiff's enclosure remained untouched, and himself at liberty to enter thereon without fear of personal injury, the plaintiff could not maintain this action simply upon the ground that the defendant had entirely surrounded

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his enclosure by a fence. Under this instruction, the jury found for the defendant.

This instruction was clearly erroneous. The law recognizes no such doctrine. It is in contravention of the spirit and policy of the law. The plaintiff, by his enclosure, had acquired actual possession of so much of the land as was included therein; whether or not such possession was a trespass upon the defendant, is a question not material to the determination of the case. Admitting that it was, the law did not permit the defendant, by his own act, to arrest or obstruct the plaintiff's possession. Actual force was not necessary. The law implies force in every unauthorized entry upon the premises of which another is in the peaceable possession; and likewise, in every unauthorized obstruction of such possession; and this is sufficient to support the action, in a case like the present.

The erection of the fence was, in law, a forcible and unlawful seizure of the possession of the plaintiff's enclosure, and an ouster of his possession. The effect, in law, was, to exclude him from the occupation of the land, and such was the end designed, in fact.

His enclosure being *impounded*, so to speak, he could not have ingress or egress to and from it, without a direct act of defiance and hostility to the usurped rights of the defendant. To put an end to all such provoking and threatening scrambles for possession, was the object of the statute giving this action.

We think the action may well be maintained. Judgment reversed.

H. F. Croxdale v. The State.

H. F. CROXDALE v. THE STATE.

1. **CRIMINAL LAW. Forgery. Indictment.** An indictment for forgery must set forth with literal precision the instrument alleged to be forged, if in existence and within the control of the prosecutor; and if not in existence, or not within the control of the prosecutor, the excuse for the omission to set it forth must be stated according to the facts.
2. **SAME. Same. Same.** An indictment for the fraudulent passing of a forged paper must use the descriptive words used in the statute, or words exactly equivalent.

FROM HAWKINS.

This was an appeal in error, by the prisoner, from a judgment of the Circuit Court of Hawkin's county, upon a conviction under § 41 of the felony code of 1829, for fraudulently passing a forged instrument.

L. C. HAYNES and T. D. & R. ARNOLD, for the prisoner.

HEISKELL, for the State.

McKINNEY, J., delivered the opinion of the Court.

The judgment in this case must be reversed and arrested. The fifth count of the indictment, on which alone the prisoner was convicted, is wholly insufficient to support the conviction. It is essentially defective, both in substance and in form.

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In an indictment for *forgery*, it is essentially necessary that the instrument alleged to be forged should be set forth with literal accuracy, if in existence and within the control of the prosecutor; and if not in existence, or not within the control of the prosecutor, the excuse for the omission to set forth the instrument must be stated; and such excuse, being traversable, must be stated according to the facts of the case. See *Hooper v. State*, 8 Hum., 101.

The count in question does not profess to give an exact copy of the instrument charged to have been a forged paper. The word "purport," used in the count, is not equivalent to the word *tenor*. The latter signifies, in law, an exact, literal copy; the former word signifies merely the meaning or import of the instrument.

The descriptive words "pass or transfer" used in the 41st section of the penal code, upon which the indictment is framed, are omitted. And in the frame of the count, in other respects, there is a departure from the established and approved forms of pleading, in such cases, not to be favored.

For these defects in the indictment, the judgment will be arrested. But, inasmuch as the proof shows a *prima facie* case against the prisoner, he will be remanded to the jail of Hawkins county, to be proceeded against *de novo*.

James Ruggles *et al.* v. W. W. Williams *et al.*

JAMES RUGGLES *et al.* v. W. W. WILLIAMS *et al.*

MORTGAGE. *Fraudulent conveyances. Registration.* In a contest between two mortgage creditors, for priority of satisfaction out of property conveyed to both, it appeared that the instrument first "noted" by the clerk for registration but last registered, was upon its face a deed absolute, but was admitted and shown by parol to have been intended as a mortgage, and that the other was a mortgage in proper form; and it is held, that the party to the first named instrument is not deprived of the benefit of his security, merely because the instrument is in the form of a deed absolute, instead of a mortgage; but, that when a parol defeasance is shown, it only has the effect to reduce the title to that which was intended by the parties—a security for debts, instead of a sale of the property.

FROM KNOX.

This was a contest by bill and cross-bill in the Chancery Court at Knoxville, between J. S. Moffitt, on the one part, and Neuffer, Bronson, *et al.*, on the other, for priority of satisfaction out of certain property conveyed to each of the parties in mortgage, as creditors of W. W. Williams, an absconding debtor. In the Court below, the Chancellor decreed for Moffitt, from which the other parties appealed.

MAYNARD and BAXTER, for Neuffer, Bronson, *et al.*

LYON and REESE, for Moffitt.

CARUTHERS, J., delivered the opinion of the Court.

The parties in this case, except defendant Williams,

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are creditors of Williams, who has failed and absconded. The contest is for priority of satisfaction out of certain real estate owned by him near the city of Knoxville. They all claim under mortgages and deeds of trust, except Ruggles, who had a judgment at law, and filed the original bill, to reach the land contained in the deeds. He has heretofore obtained relief, and no further question is made as to him. But the contest is between Moffitt and Neuffer and Bronson, under their respective mortgages. The Chancellor decided in favor of Moffitt, and Neuffer and Bronson appealed. This is the only question now before us.

The deed to Moffitt was made and dated 1st of August, 1854, acknowledged before the clerk on the 3d of same month, and noted for registration 19th of June, 1855, and registered August the 30th, 1855.

The mortgage to Neuffer is dated 29th of June, 1855, acknowledged on the same day, and registered July the 7th, 1855.

By the registry act of 1832, deeds take effect only from their registration, but the act of 1841, ch. 12, sec. 2, gives the same efficacy to a notation for registration. Other questions out of the way, then, there can be no doubt but that Moffitt occupies the vantage ground in this contest.

But his deed is absolute, when it was only intended to be a mortgage, as he admits, to secure certain debts and liabilities. This not appearing in the deed, nor any defeasance to that effect registered, or in fact existing, except in parol, it is insisted that the deed is fraudulent in law, and inoperative as to creditors and subsequent purchasers, or incumbrancers. This position would

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seem to be sustained by the North Carolina cases of *Gregory v. Perkins*, 4 Dev., 50, *Halcombe v. Ray*, 1 Iredell, 342, and other cases, as well as other authorities relied upon in argument.

These cases go upon the ground, that inasmuch as the registry acts only give effect to mortgages from their registration, the registration of an absolute deed is no compliance; that when it appears by parol that the registered deed was, in fact, only intended as a mortgage, then the real transaction, the mortgage, is not registered, and must be postponed in favor of intervening incumbrancers, purchasers, or creditors.

There is certainly much plausibility, not to say strong reason, in this position. The high character of the Courts from which the authority comes, challenges due consideration and high respect, and deference. And we need not say to what extent we would be disposed to yield to the imposing authority of the cases presented, if we regarded the question as an open one in our jurisprudence. We are not, however, aware to what extent the peculiar statutes of the States where that doctrine has been established, on the subject of registration, may have influenced their decisions.

But if it has ever been controverted in this State that an absolute deed, duly registered, might be maintained as a mortgage, it has never come to our knowledge. Such has certainly been the uniform holding of our Courts. To change it now would shake the rights of property, and lead to great mischief and confusion. The great object of the registration laws is to give notice of the position and change of titles to property, as well as all incumbrances upon it. This is necessary for

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the protection of purchasers, and the information of creditors. Is not this object as well accomplished by the registration of a deed in fee, when the real transaction is only a mortgage, as if it had been in the form of the latter? Certainly a subsequent purchaser cannot object because he has notice that the whole estate has passed, instead of the imposition of an incumbrance upon it. So, one about to deal with the former owner, has a stronger warning against extending credit. True, it may be well argued, that existing creditors may be deterred from seeking their debts against the equity of redemption of their debtors, by the false form in which the transaction is presented in the deed. Yet, they have it in their power, at any time, to probe the parties and find out the truth. It is not often that the concealment is so perfect as to avoid suspicion and escape detection. It may be a circumstance to excite suspicion, that where the object is only to secure debts, a deed, instead of a mortgage or deed of trust, is made and spread upon the records; yet it is not always done in bad faith. The course of our adjudications has been to hold all these securities good, so far as they are for an honest purpose, but no further. Upon this policy, we have held that a deed of trust, or mortgage to secure some debts that are fictitious, and others, real and *bona fide*, shall be a valid security for the latter, though fraudulent as to the former. So in this case, though the paper is not good to carry the absolute estate, yet it is valid as an incumbrance to the extent of the debts secured. The greater includes the less estate. It is enough for a subsequent incumbrancer, that the title registered against him is reduced

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in his favor, and he has the same advantage as if the actual transaction were in the writing.

Now if the vendee in such a case were to sell the fee, or the same be sold upon execution against him, neither the vendor nor his creditors could set up the parol defeasance. But that question does not arise here; yet it shows the hazard to which the owner has exposed his property, and should deter him from conveying more than he intends.

Some argument is made against Moffitt's deed, upon the ground of the non-existence of debts and liabilities, it is alleged it was designed to secure. An account and report was ordered to ascertain that matter, and how it may turn out upon investigation, we cannot now tell. We have not that aspect of the case before us; it may bring up very different questions and entirely change the result.

We decide nothing more now, than that, all other things being right, a party is not deprived of the benefit of his security because the instrument registered is in the form of a deed absolute, instead of a mortgage; but that when a parol defeasance is shown, it only has the effect to reduce the title to that which was intended by the parties; that is, a security for debts, instead of a sale of the property. Let the decree be affirmed and the cause remanded for the account.

James Johnson v. Wm. M. Churchwell *et al.*

JAMES JOHNSON v. WM. M. CHURCHWELL *et al.*

CORPORATION. *Bank of East Tennessee. Personal liability of directors. Act of 1848, ch. —, § 12.* By the 12th section of the charter of the Bank of East Tennessee, the directors of that institution, who may sanction certain violations of the charter specified therein, may be held liable in their individual property, for any loss or damage thereby, to the creditors of the bank; and it is held, that before such liability can be enforced, it must be established by some judicial proceeding set on foot for that purpose, that said charter has been violated; though it is not essential that a forfeiture of the charter be declared; and it must be shown also, that the effects of the corporation have been exhausted.

FROM KNOX.

This cause is from the Chancery Court at Knoxville. The bill was demurred to, and the demurrer allowed by Chancellor LUCKY, from which complainant appealed.

HUMES and MYNATT, for the complainant.

CROZIER, COCKE and REESE, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The bill seeks to subject the directors of the bank, personally, to the payment of \$5,750.00, of the notes issued by the bank, in circulation at the time of its failure, of which the complainant became owner. Payment or redemption of said notes having been demanded after the failure of the bank, and refused, the complainant sued the corporation before a justice of the

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peace, and recovered several judgments upon which executions issued and were returned "no property found."

The bill was against Churchwell (who, it is alleged, was the owner of the stock,) and the directors, to hold the latter "responsible, in their private property," for the satisfaction of said judgments, under the provisions of the 12th section of the act incorporating said bank, on the ground, that the corporation had violated the charter in exceeding the amount of issues authorized to be made by the bank, and in extending accommodations to Churchwell, to an amount and in modes, not authorized to be given by the charter.

No proceeding of any kind, was instituted against the corporation previous to the filing of this bill, or since, to establish the violations of the charter, on the alleged existence of which the complainant bases his claim to relief; nor is the corporation made a party to this bill; neither is it distinctly alleged in the bill that the assets of the bank are exhausted.

The bill was demurred to, and the Chancellor allowed the demurrer and dismissed the bill. The case is brought, by writ of error, to this Court.

Upon any just construction of the 12th section of the act of incorporation, it must be held, that there are two indispensable pre-requisites to entitle the complainant to charge the directors personally: First. That the alleged violations of the charter shall be established in a direct proceeding against the corporation for that purpose, by some judicial proceeding in a Court of Record in this State. The 12th section does not demand, as preliminary to charging the directors with personal liability, that a forfeiture of the charter should be first actually declared, as against

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the corporation. It is enough to lay a ground for such personal charge, that the *fact* of violation of the charter, in either of the ways specified, has been made to appear in a proceeding "by *scire facias*, or any other judicial proceeding in any of the Courts of Record of this State." And although by the common law the forfeiture of a charter can only be enforced in a Court of law, in a proceeding by *scire facias*, or on an information in the nature of a writ of *quo warranto*. Yet in this State there can be no doubt that, under the act of 1846, ch. 55, a Court of Chancery is invested with the jurisdiction to inquire into and determine the fact of a violation of the charter by the corporation, in the respects indicated in the 12th section of the act incorporating the Bank of East Tennessee.

It is clear, that inasmuch as the fact of such violation of the charter constitutes the only ground for holding the directors personally responsible, there can exist no right or cause of proceeding against them, until the violation of the charter shall have been previously established against the corporation.

The second pre-requisite is, that the assets of the bank of every description, legal or equitable, shall have been exhausted. The individual liability of the directors cannot be enforced so long as there may remain any property or effects of the corporation to redeem its notes, or discharge its debts.

Upon the establishment of the violation of the charter, as contemplated by the 12th section, the directors may be proceeded against by an original bill; or, to save circuitry, they might be brought in by a supplemental bill filed in the pending suit against the corpora-

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tion. But which ever mode may be adopted, it must be alleged and shown, that the fact of violation of the charter has been previously established; and the measure of the liability of the directors will be the amount which the effects of the corporation may fall short of discharging its liabilities, in consequence of such violation of the charter. This, in the words of the charter, is the "loss or damage" for which "the directors *voting for*, or who may have *sanctioned* such violations of the charter shall be responsible in their private property."

In this view the demurrer was properly allowed. The cause will be remanded to await a proceeding against the corporation, as hereinbefore indicated.

J. E. BONE *et al.* v. LETHA RICE *et al.*

PRACTICE. *Appeal. Arbitration.* Where the parties to a litigation in Court, agree to submit the matters in controversy to the decision of arbitrators, whose award is produced in Court and simply adopted as the judgment thereof without anything more; neither party has the right of appeal to the Supreme Court. And the fact that the parties, in their article of submission, expressly reserve the right of appeal does not alter the rule.

FROM MARION.

This action of ejectment is from the Circuit Court of Marion county. The parties agreed to submit the matters in controversy to the decision of arbitrators,

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reserving the right of appeal to this Court. The award of the arbitrators was for the plaintiffs, and was produced in Court and adopted as the judgment thereof. The defendants appealed.

HYDE and FRAZIER, for the plaintiffs in error.

MINNIS and J. L. BOSTICK, for the defendants in error.

CARUTHERS, J., delivered the opinion of the Court.

This action of ejectment was instituted in the Circuit Court of Marion county, on the 3d of March, 1856. Between the July and November Terms, 1857, the cause was submitted to the arbitrament and award of Key, Welcker and Turney, by the written agreement of the parties. At the latter Term said agreement and the award of the referees in favor of the plaintiffs, were presented to the Court and spread upon the minutes, as the judgment of the Court. It is agreed in the article of submission, that the "decision" of the arbitrators "shall be entered upon the record as the judgment of the Court." And further, that "the undersigned agree to abide by and be bound by said decision, each party *reserving, however,* the right of appeal to the Supreme Court."

After entering the award and the judgment of the Court upon it, the record continues, "the defendants, by their attorneys, except in law and tender their bill of exceptions to the Court, which is signed and sealed by the *arbitrators* and the Court, and made a part of

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the record, and pray an appeal," &c. The so-called bill of exceptions consists of the title papers and other evidence, written and oral, reported by the arbitrators, as having been submitted to them, and on which they made their award, and is signed by them under seal. At the close of this the Judge states that:

"The foregoing was agreed to by the parties, by their attorneys, and signed by the arbitrators, and was filed in open Court as the bill of exceptions in the cause; and by consent, is made a part of the record in the cause in this Court."

This is certainly, to say the least, a very novel proceeding, and surely has never before been known in the practice of the Courts in England or America. The proof upon which the award was made was unknown to the Court, not having been introduced before it in a trial of issues, and therefore can properly find no place in a bill of exceptions to which reference can be made by this Court. What questions of law or fact may have arisen before, and been decided by the arbitrators in arriving at their conclusions, we cannot know, because the evidence is not before us by the certificate of the Judge, and could not be, as it was never heard by him.

But it is insisted, that the right of appeal to this Court was expressly reserved to either party in the articles of submission. Could that agreement give us jurisdiction? Our jurisdiction is confined to appeals from judicial tribunals, and has never yet been extended to cases out of Court. If parties prefer to submit their matters of difference to private and unofficial individuals, they have a right to do so, but cannot appeal from a

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tribunal of their own creation, to those established by law. The reservation of such a power is utterly void and inoperative.

They might have objected to the award being made the judgment of the Court, upon such grounds as are recognized by the law; and in that mode brought under adjudication there, and here by appeal, all questions thus properly made. But nothing of that sort was done and the case is here by simple appeal from the award of the arbitrators. This, as we have seen, cannot be done and the appeal is, therefore, dismissed and the cause remanded for the execution of the judgment upon the award.

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PRACTICE AND PLEADING. *Contract.* The party for whose benefit an instrument not under seal is executed, may sue thereon in his own name, although the engagement be not directly to, or with him. And the same rule applies to a contract made with an agent.

FROM HAWKINS.

This action of assumpsit is from the Circuit Court of Hawkins county. At the May Term, 1858, before PATTERSON, J., verdict and judgment were for the plaintiffs. Defendant appealed in error.

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L. C. HAYNES and T. D. & R. ARNOLD, for plaintiff
in error.

HEISKELL, for the defendants in error.

WRIGHT, J., delivered the opinion of the Court.

This is an action of assumpsit brought by John G. King, William G. Peck, Samuel W. Hansford and George C. Longhorne upon the following instrument: "James T. Brice has this day sold to N. B. Brice, agent of John King, Peck, Hansford & Co., of Washington county, Va., from 80 to 100 head of fat hogs, to weigh 200 pounds and upwards, (good merchantable hogs;) the said hogs to be weighed at Brice's pen from the 10th to the 30th November, 1855; the said company to execute a note and such security as said Brice may ask, at \$4.25 per hundred pounds, sixty days after date. October 9, 1855.

"JAMES T. BRICE,

"N. B. BRICE."

The plaintiffs in their declaration aver that this contract was made by James T. Brice, with them, by the name and description of John King, Peck Hansford & Co., by their agent, N. B. Brice. It is now assigned for error that this declaration is defective, and that the plaintiffs' demurrer to the defendant's pleas should have been sustained to it, because it introduces into the suit, as plaintiffs, new parties that do not appear in the contract. This objection is untenable. Whether the plaintiffs be co-partners, or a company of individuals trading under this company name, if the contract were really made with them as they allege, they would be jointly

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interested in it and could maintain the suit. Whether this be so or not is a question of evidence and cannot be reached by the demurrer.

If the instrument be not under seal it is well settled that the party for whose benefit it is made may sue thereon in his own name, although the engagement be not directly to, or with him. And the same rule applies to a contract made with an agent. 1 Chitty's Pl., 4 and 6.

It is objected, also, that this contract is not obligatory on James T. Brice, and that he was not bound by it to deliver the hogs. In this construction of the instrument we cannot agree. The evident meaning is otherwise.

The judgment is affirmed.

JOHN GOLDSMITH v. THE STATE.

1. CRIMINAL LAW. *Act of 1833, ch. 10. Running horse races along a public road.* To constitute the offence of running a horse race along a public road, under the act of 1833, ch. 10, it is not necessary that there should be a bet or wager upon the result of such race.
2. SAME. *Same. Same. Indictment. Variance.* An indictment charging the offence of running a horse race in and along a public road, is maintained by proof that mules were used in the same, and not horses.

FROM WASHINGTON.

The plaintiff in error appeals from a judgment of the Circuit Court of Washington county, upon a convic-

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tion of the offence of running a horse race along a public road.

MAXWELL, for the plaintiff in error.

HEISKELL, for the State.

CARUTHERS, J., delivered the opinion of the Court.

The presentment and conviction in this case were for a violation of the act of 1833, ch. 10, by running a horse race upon a public road.

The charge in the presentment is, that the defendant did "then and there run a *horse* race in and upon, and along a public highway in said county." The proof shows that the defendant and one H. Corn run a race with mules on the "Iron Mountain road," in Washington county, and that the same was and is a public road. It does not appear that there was any wager, or any previous agreement to run the race, or that the meeting was for that purpose. The Court charged that this was not necessary to constitute the offence, but that it was sufficient, "if two persons met simultaneously in the road and without saying any thing, commenced running a horse race over a public road." This is undoubtedly correct. The mischief which induced the act, was the danger and annoyance this practice was calculated to produce to ladies and others who might be passing over a public highway. This would be the same whether the race was by previous concert for a wager, or otherwise. The act is general in its terms and there is no reason why it should be limited by construction.

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But the case is mainly rested upon a question of variance between the proof and presentment; and that a mule race is not charged, nor is it prohibited by the act. His honor correctly held that this was not a fatal variance.

The word "horse" is sometimes used, says Bouvier, in his Dictionary, 590, as a generic name, including all animals of the horse kind. The phrase "horse race," as used in this statute, embraces horses, mares, and mules, at least.

The conviction was proper. Let the judgment be affirmed.

ANDREW CLOWERS v. JOHN R. SAWYERS *et al.*

PRACTICE. *Trespass. In removing line fences.* In an action of trespass, for removing a line fence dividing the lands of the plaintiff from the defendant, the jury should be instructed to ascertain from the evidence whether the fence was constructed upon the land of the defendant, or the plaintiff, or whether it was upon the supposed line between them and kept up jointly, and recognized as a line fence. If such fence was erected upon the land of the defendant he had a right to remove it; if upon the land of the plaintiff he had no such right. If, however, it appear from all the testimony that the fence was upon the supposed line between them, and kept up jointly as a line fence, the defendant had a right to remove his part of it, upon giving reasonable notice to the plaintiff of his intention to do so.

FROM KNOX.

Trespass vi et armis from the Circuit Court of Knox county. At the October Term, 1857, before Judge WELCKER, verdict and judgment were for the plaintiff. The defendant appealed in error.

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MYNATT and SCOTT, for the plaintiff in error.

MAYNARD, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

This was a suit by *warrant* before a justice of the peace, against Clowers, for removing the rails of a fence claimed by the plaintiffs; and on the trial in the Circuit Court judgment was rendered against him, and he has appealed in error to this Court.

The lands of the parties adjoined, and there was much proof as to where the true dividing line between them was, and on which side of the line the fence was, or whether it was a common fence between them, on a common dividing line. In this state of the facts the Circuit Judge charged the jury that the main question was, where the line between the parties ran and upon whose side of it was the alleged trespass committed. If the fence was on the defendant's side of the line he had a right to move it, and do what he pleased with it: but if upon the plaintiff's side he had not the right to interfere with it. If, however, the jury should find from the facts in the case, that the fence was made and kept up jointly by the defendant and the plaintiffs, or those under whom they claimed, immediately upon the line between them, then the defendant had the right to remove his portion of it upon giving to the plaintiffs, or their guardian, reasonable notice of his intention so to do.

There is no error in this charge of which Clowers can complain. It is certainly favorable enough to him.

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The Court did not undertake to tell the jury where the true line was, nor that, in its ascertainment, they were to look alone to the *deeds* of the parties, any more than to *acts of acquiescence* and *possession*. It was left to them to ascertain the line, upon all the facts; and no special instructions as to the force of the deeds and possession were asked, and the error assigned by the counsel of the plaintiff in error does not arise in the record.

Judgment affirmed.

W. & A. R. R. Co. v. R. J. KELLY.

PRACTICE. *Evidence. Common carrier.* The consignor of cotton, who is the owner thereof, may maintain his action against a common carrier for the loss of the cotton; and the consignee, who is a mere factor, may be a witness for him.

FROM HAMILTON.

Action on the case from the Law Court of Chattanooga. Verdict and judgment below for the plaintiff Kelly, GAUT, J., presiding, and appeal in error by defendant.

BURCH, for the plaintiff in error.

HOPKINS, for the defendant in error.

W. & A. R. R. Co. v. R. J. Kelly.

WRIGHT, J., delivered the opinion of the Court.

There is no error in this judgment.

The first error assigned is, that Scruggs, Drake & Co., the consignees of the cotton, should have brought the suit. It is true, as a general rule, that the consignee is the proper person to sue. But here, Kelly, the defendant in error, is shown to have been *the owner* of this cotton, and he was the proper person to sustain the action, as held in *Turney v. Wilson*, 7 Yer., 340.

It is next objected that the Circuit Judge permitted oral evidence, of the delivery of the cotton, to be given to the jury when there was a receipt in *writing*, and it not produced, or accounted for. But it does not clearly appear in this record that Campbell, the clerk and agent of the defendant who *forwarded* the cotton, executed any receipt; and certainly not that Burns, the clerk who *received* the cotton at the river for the company, gave any. The delivery at the river fixed the liability of the company. Then, if the law was that the *mere fact of delivery* could not be proved orally when there was a receipt, still, we think, in this case the Court did not err.

It is next assumed that the Court erred in permitting the deposition of Drake, one of the consignees, to go to the jury, because it is alleged he was an *interested* witness. But we think this position also untenable. The house of Scruggs, Drake & Co., never had the cotton in their possession, and are under no liability about it. And it is not perceived that they have any interest in the suit. The cotton belongs to Kelly and the recovery is for his benefit, and he is liable to

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Scruggs, Drake and Co. for their advancements to him, at all events, whether the suit is gained or lost.

Besides, they are factors, and constitute, as a general rule, an excepted class in the law of evidence. This exception has its foundation, says Mr. Greenleaf, in public convenience and necessity. 1 Greenl. Ev., p 416.

The judgment is affirmed.

JOHN H. HUNTER v. THE STATE.

CRIMINAL LAW. *Principal and agent. Noxious food.* A person engaged in the business of furnishing provisions for market, is bound to use ordinary prudence and care to avoid the sale of noxious and unsound food. If his agent sell noxious provisions, the condition of which he or his agent might, by due care, have ascertained, he will be criminally liable.

FROM CAMPBELL.

Indictment in the Circuit Court of Campbell county, for the sale of noxious provisions by the agent of defendant. At the May Term, 1858, before TURLEY, J., defendant was convicted and fined. He appealed in error.

TRIGG and TEMPLE, for the plaintiff in error.

HEISKELL, for the State.

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This was an indictment and conviction for selling unwholesome food, and the defendant has appealed in error to this Court.

The Circuit Judge charged the jury, that the defendant and his agent should be held to ordinary prudence and care in ascertaining the true condition of the thing sold. If the pork was unsound, and the defendant might have known it by ordinary care and diligence on the part of himself or those employed by him in preparing it for market, he should be convicted, whether, in point of fact, he knew it or not. But if it was unsound, and the defendant did not know it, nor could have known it by ordinary and proper prudence and care, he would not be guilty. This charge seems to be sustained by the principles of the cases of *Rex v. Burnett*, 3 M. & S., 11, and *Rex v. Medley*, 6 E. & P., 292, and by 1 Russell on Crimes, (7th Am., from 3d London edition, 1853,) 109, 110. In the last named case, as quoted by Russell, it is said to be an indictable offence to convey the refuse of gas into a public river, and thereby to render the waters corrupt, insalubrious, and unfit for the use of man; and the directors of a gas company are responsible for the acts done by their superintendent and engineer under a general authority to manage the works, though they are personally ignorant of the plan adopted, and though such a plan be a departure from the original and understood method, which the directors had no reason to suppose was discontinued; for if persons, for their own advantage, employ servants to conduct works, they are answerable for what is done by those servants. And in *Rex v. Burnett* the master seems to have been held criminally liable for the acts.

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of his servants done in the course of their employment, where due care was not used by him in the sale of the noxious article.

The judgment will be affirmed.

C. NEIFFER v. THE BANK OF KNOXVILLE.

BANKS. *Contract by. President and cashier. Custom.* In an action against a bank to recover the amount of a draft drawn and signed by its president, with acceptance waived, it appeared that no special authority was delegated to that officer to draw checks by the charter, but that such duty, by the general custom of other banks, devolved upon the cashier, except in the absence of that officer, when the duty was performed by the president; that such also had been the usage of the bank in this case, and that in the absence of the regular cashier, but while a temporary cashier was discharging his duties, the draft in question had been drawn and signed by the president; and it is held that the bank was liable for the payment of the draft.

FROM KNOX.

Action of debt, from the Circuit Court of Knox county. At the October Term, 1857, before TURLEY, J., verdict and judgment were for the defendant. The plaintiff appealed in error.

TRIGG & TEMPLE, and MAYNARD, for the plaintiff.

HUMES & HUMES, for the defendant.

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McKINNEY, J., delivered the opinion of the Court.

This was an action of debt brought by Neiffer, as holder of a paper purporting to be a check or draft for \$3,000, drawn by the Bank of Knoxville on H. W. Conner of Charleston, South Carolina, payable to D. L. Bronson. The check was made payable thirty days from date, and acceptance was waived by an endorsement on its face. No funds were placed in the hands of the drawee to meet the payment of the check, and it was protested for non-payment.

Under the instructions of the Court, the jury found a verdict for the defendant, upon which the Court rendered judgment.

The "Bank of Knoxville" is one of the free banks organized under the act of 1851-2. At the date of the check sued on, M. W. Williams was president, and John L. Moses cashier of said bank. The check was drawn and signed by the president in his official character. This fact constitutes the principal ground of defence—it being assumed that the president had no authority to draw a check, and consequently the act is not binding on the bank.

The charter of the bank—the act of 1851-2—is silent upon this subject; and there is no by-law or regulation of the bank assigning the duty of drawing bills or checks to any particular officer of the bank. The objection to the power of the president to bind the bank, therefore, rests upon the general principle that, in the absence of any positive regulation to the contrary, the cashier is the executive officer, through whom all the moneyed operations of the bank are to be conducted

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It is admitted to be true, as a general proposition, that where the charter of incorporation prescribes the particular mode in which its contracts shall be made or authenticated, that mode must be pursued; for corporations, like natural persons, are in general bound only by the acts and contracts of their agents within the scope of their authority. And all restrictions upon the power of the agents or officers contained in the charter, every one dealing with the corporation is bound to notice. But if no definite rule is to be found, either in the charter or by-laws of the institution, in regard to the manner and form in which its acts and contracts shall be evidenced, then, it seems, general usage, and the course of business of similar institutions, is to govern; the officers will be presumed to have been invested with the customary authority, and their acts within the scope of such usage, practice, and course of business will be binding on the institution, in favor of third persons having no knowledge to the contrary.

There can be no doubt, however, that, notwithstanding a bank, or other corporation, may be authorized to contract in a prescribed mode, either by its charter, or by-laws, or general usage, it may depart from the prescribed mode, and render itself liable upon contracts executed or authenticated in a different mode. Thus, although the president of a bank be not authorized, by virtue of his office, to draw checks for [the moneys of the bank, it is clear that the company may empower him, as its agent, in a particular instance, or generally, to do so; and that, in such case, the bank will be bound by the act. Corporations, in this respect, stand upon the same footing with natural persons, and are [alike

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bound by the acts of its agent beyond the limits of his authority, if done by their previous or subsequent assent, or express or implied direction.

The proof in this record establishes, that, by the general usage of banks in Tennessee, the cashier is the executive officer of the bank, and the proper person to draw and sign checks, but that, in the absence of the cashier, the practice is for the president to draw and sign checks, &c., without any special authority for that purpose. And the proof further establishes, that the practice in this particular bank, from its first organization, had been for the president to draw checks in the absence of the cashier.

It is admitted that the cashier was absent at the time the check sued on was drawn; but it is said that, during his absence, another person had been temporarily appointed to act as cashier in his stead. This assertion is not proved by anything in the record before us; but if it were established, it would not vary the question. It is sufficient to vest the president with authority to do the act, that the regular, permanent officer, known as cashier, is absent from the bank, at the time the official act is required to be performed. And, in the absence of any positive prohibition upon the exercise of such a power by the president in the charter of incorporation, it is difficult to perceive any very sensible reason why such a power might not as well be exercised by the one officer as the other, so far as regards the binding effect of the act upon the bank. The objection is a highly technical one, and it will not do to permit corporations, especially banks, to escape their just liabilities on such unsubstantial and flimsy pretexts.

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Upon this point his honor, the Circuit Judge, erred in his instructions to the jury.

The decision of the foregoing question disposes of the objection to the notice of protest. And, as the case must go back for another trial, we forbear to notice the question of fraud made on the trial. It will be left open, without any intimation upon the facts.

Judgment reversed.

JESSE SPEARS v. JOHN A. WALKER.

ESTOPPEL. *Admissions and declarations as to land boundaries.* Admissions which have been acted upon by others are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced. Thus, in ejectment, where it appeared that many years before the suit the defendant had admitted a certain line to be the true boundary between him and the plaintiff, and the plaintiff and those under whom he claimed had accordingly so held and claimed ever since, the defendant is held to be estopped from a denial of such boundary.

FROM HAWKINS.

This action of ejectment is from the Circuit Court of Hawkins county. Verdict and judgment below were for the plaintiff. The defendant appealed in error.

HEISKELL, for the plaintiff in error.

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L. C. HAYNES and C. W. HALL, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

This was an action of ejectment by Walker, in which he obtained a verdict and judgment. The motion of Spears for a new trial being overruled, he filed his bill of exceptions, and has brought the case to this Court by an appeal, in the nature of a writ of error. In order to make out his title, Walker resorted to the following proof: He read a grant from the State of Tennessee to Jesse Spears, the defendant below, for fifty acres of land, dated in 1823; a deed from Lewis Lawson to Peter Smith, dated the 17th of February, 1837; and a deed from Smith to himself, dated the 1st of June, 1847. This grant and these deeds embraced the land in dispute, which is that part of the grant to Spears which lies east of the road leading from Rogersville to Greenville. He also read a grant from the State to Jacob Lawson, dated in 1824; a deed from Lazarus Lawson to Lewis Lawson, dated in 1832; and a grant from the State of North Carolina to John Payne, dated in 1793. But these last named papers, though they adjoined the land in dispute, seem not to have embraced it. Walker then made proof tending to show that Jacob Lawson and his family, and Smith and himself, who claimed under them, had held the land in dispute for more than twenty years, under a claim of ownership. It does not distinctly appear in this record, in what way Jacob Lawson parted with whatever interest he may have had in this land. He is not shown to be dead, or that

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Russell, Lazarus, and Lewis Lawson, who are his children, are his heirs. But it seemed to be taken for granted, on the trial below, that the deed from Lewis Lawson to Peter Smith carried the title of the Lawson family.

There seems to have been, at a very early day, some contract in writing between Jacob Lawson and Spears, to the effect that *the road* should be the dividing line between them; but the exact nature of this engagement does not very clearly appear, as Spears re-possessioned himself of the instrument, and it is not in the record. He, to be sure, makes proof that this contract was rescinded in 1827. But it is clear that Jacob Lawson and his family, and Smith and Walker, after their purchases, from the year 1830, always claimed the road as the true boundary; and this was conceded by Spears until about the time this suit was commenced in 1852.

It does not appear whether the grant to Spears had ever actually been surveyed and marked.

In this state of uncertainty as to the true boundary, Walker made proof that when Lewis Lawson and Peter Smith were having the land surveyed in 1837, with a view to complete the purchase made by Smith of Lawson, Spears came in the evening to where they were surveying the disputed land, running the line along *the road*; and he said, let *the road be the line*. Spears knew at this time that Peter Smith had purchased the land *to the road*, and that the object of the survey was to enable the parties to carry out Smith's purchase. This he did and said in the presence of Smith and Lawson. *The road* was, accordingly, in that survey, fixed as the boundary, and Smith took his deed and paid for

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the land, believing that he was getting a valid title to the *road* and the land in dispute. It is apparent that he was induced to do this, not only by the acts and declarations of Lawson, but also by the acts and declarations of Spears. And Walker, in purchasing of Smith, acted upon the same belief and boundary.

Now we hold that the Circuit Judge acted very properly in receiving this evidence, and in instructing the jury, as he did, that Spears was estopped to deny Walker's title to this land, and that *the road* was, as between them, the true boundary. This matter of estoppel might very well be enforced in a Court of Law. *Merriwether et al. v. Larmon et al.*, 3 Sneed. 447; *Barham v. Turbeville et al.*, 1 Swan, 487.

Objection, in this case, has been made to the verdict of the jury, because of its alleged uncertainty. But we deem it entirely sufficient and valid, under the rule laid down by this Court in *Loard et al. v. Philips et al.*, 4 Sneed, 566.

Affirm the judgment.

EAST TENN. & GA. RAILROAD COMPANY v. J. L. HACKNEY.

1. NEW TRIAL. *Practice. Act of 1801, ch. 6, § 59.* The fact that new counts which vary the form but do not change the cause of action have been added to the declaration after two new trials have been granted, will not affect the operation of the act of 1801, ch. 6, § 59,

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which provides that not more than two new trials shall be granted to the same party in the same cause at law, or upon a trial of an issue of fact in equity.

2. *SAME. Same. Same.* The exceptions to the provisions of the act of 1801, ch. 6, § 59, that not more than two new trials shall be granted the same party in the same cause at law, or upon the trial of an issue of fact in equity, are, where the new trial is granted for errors in the charge to the jury; the improper admission or rejection of evidence; or upon the ground of misconduct on the part of the jury; provided such reason be stated upon the record at the time.

FROM KNOX.

Action on the case from the Circuit Court of Knox county. Verdict and judgment for the plaintiff, at the July Term, 1858, GAUT, J., presiding. Appeal in error by defendant.

MAYNARD, LYON, REESE, and HALL, for the plaintiff in error.

TEMPLE, BROWN, and COOKE, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

This is an action for damages for failure to carry certain beef cattle, and for injuries done to them by the agents of the defendant. There have been three verdicts for the plaintiff; the first was for \$150; the next for \$500; and the last for near \$600.

The Circuit Judge granted two new trials, upon the ground that the verdicts were not warranted by the facts, and refused the third application, because he considered his power exhausted.

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By the act of 1801, ch. 6, sec. 59, "Not more than two new trials shall be granted to the same party, in the same cause at law, or upon the trial of an issue of fact in equity." Car. and Nich., 500. The new trials in this case were both granted to the defendant. We have had two cases reported in which that statute was construed; one in 10 Yer., 499, and the other in 1 Hum., 16. In those cases it was decided that the restriction does not apply to cases where either of the new trials were granted for errors of the Court in charging the jury, or in the admission or rejection of evidence, or for misconduct of the jury, provided such ground be stated on the record at the time. This was an exception made by the Court to the letter of the statute. In this case, we are asked to make another exception, viz.: where new counts are added after the new trials have been granted. This we are not prepared to do; particularly where, as in this case, the cause of action is still the same, though put in a different shape and form. How it might be in a case where, under the present broad statutes of amendment, a different cause of action is introduced in new counts, we need not now say. The application for rehearing refused, and the judgment of affirmance heretofore entered, will stand.

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JOHN GOODMAN *et al.* v. THE TENNESSEE MINING CO. *et al.*

1. **SCHOOL LANDS.** *State holds them as trustee.* The title to the lands in Tennessee, set apart by Congress for the use of schools, vested in the State, as a corporation, coupled with a trust. The State is merely a trustee in relation to these lands, bound by the restrictions of the acts of Congress, and the children of the respective townships are the beneficiaries.
2. **SAME.** *Lease of. School Commissioners. Case in judgment.* The School Commissioners have no power to lease the school lands for a longer period than is prescribed by law. If a lease is made for a longer term than the law authorizes, it is void, and will be set aside upon a bill in equity. The act of 1843, ch. 46, passed by Congress, authorized the Legislature, in case it should be deemed inexpedient to sell them, to make provision for leasing the school lands for any term *not exceeding four years*. The Legislature, by the act of 1850, authorized the lease of the unsold school lands in Polk county, but fixed no limit as to time. The school commissioners for the 8th district of said county leased their school lands for the period of ninety-nine years. Held, that said lease is in contravention of the act of Congress, and void.
3. **SAME.** *Sale of. Case in judgment.* A sale of school lands previously leased is unauthorized by law, and the sale is void; and this is so, although the lease itself may be a nullity. By the act of 1843, ch. 356, Congress authorized the State, upon certain conditions, to sell the school lands. The Legislature, by the act of 1844, ch. 104, amended by the act of 1846, ch. 121, in pursuance of the power given by Congress, made provision for the sale of these lands. Under these acts certain school lands in Polk county were sold, and the sale confirmed; but before the sale was made, the school commissioners, under the act of 1850, leased said lands for ninety-nine years. Held, that the sale was void, and communicated no title to the purchaser.
4. **SAME.** *Grant. By whom questioned.* A person whose claim or interest originates subsequent to the issuance of a grant by the State cannot question its validity; but it may be set aside in favor of an older special entry upon which a younger grant has issued. This principle does not affect the title to the school lands. The title to them is older, and is held by the State and commissioners, as trustees for the common schools of the township in which they are located.
5. **CHANCERY PRACTICE.** *Bill of review. Statute of limitations.* A bill that assumes that a sale made under a judicial proceeding is abso-

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lutely void, and seeks to set aside and annul, and not to review and correct it, is not a bill of review, and is not barred by the lapse of three years from the termination of said proceeding.

FROM POLK.

This cause was heard before VAN DYKE, Chancellor, at the August Term, 1858. The facts are stated in the opinion of the Court.

BROWN and COOKE, for the complainants.

ROWLES, JARNAGIN, and CALDWELL, for the defenants.

CARUTHERS, J., delivered the opinion of the Court

The complainants are the common school commissioners of the 8th civil district of Polk county, and in that character filed this bill on the 13th of February, 1856, to impeach and set aside a lease for ninety-nine years, made by their predecessors, of the common school section of land in that district, as well as a sale made of the same, under the order of the Circuit Court of that county, by virtue of both of which the defendants claim title.

The land is poor and broken, and almost worthless for purposes of cultivation, but has become of immense value on account of the discovery of copper ore upon it. These mines have been developed, and are now worked with great profit by the defendants. The property is supposed to be now worth several hundred thou-

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sand dollars, perhaps half a million. The veins of copper ore upon it are exceedingly rich, and regarded as almost inexhaustible.

In immediate proximity, if not upon this land, discoveries had been made before the lease or sale, and the surface indications were such, as to leave but little, if any doubt, that it was a prize worth contending for. Consequently, schemes were ingeniously set on foot and carried out, to obtain title to it. It could hardly be expected, under such circumstances that the watchfulness and care of uninterested commissioners would be much protection to a treasure so attracting, against the avidity of speculators. The deep interest of the infants of the present and future generations, in these mines of wealth, was not sufficient to excite their trustees to that degree of vigilance in their trust which was necessary to resist the schemes and machinations of those who were in eager pursuit of the glittering prize.

But the question now is, whether the present complainants, who have succeeded to the trust, can reclaim the lost treasure. This must depend upon the law of the case operating upon the facts which have transpired.

The territory which composes the State of Tennessee was ceded to the general government by the State of North Carolina, upon certain conditions specified in the deed of session, and accepted by Congress in 1789. One of these was, that a certain portion of the lands should be set apart for educational purposes. Congress, by act of 1806, ch. 31, ceded to Tennessee all the unappropriated land north and east of a certain line then established, and afterwards called the "Congressional reservation line," because all the lands on the south and west were re-

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served from entry, and exempt from any claim by Tennessee. The lands ceded embraced all East Tennessee, and a large portion of the Middle Division of the State. But this cession was upon the express condition that 100,000 acres should be set apart for colleges, and the same quantity for academies, and also 640 acres in every six miles square, or one section in each township, "for the use of schools for the instruction of children forever." The legal title passed to the State, with the positive restriction that one section should be laid off and held for schools. The right vested in the State, as a corporation, coupled with a trust. In *Lowry v. Francis*, 2 Yer., 534-41, it was held, that these lands could not be sold, and that the various acts authorizing that to be done, were unconstitutional, being in violation of the compact with the general government of 1806, by which they were to be held by the State for the "instruction of children forever." This case settled that the State was only a trustee in relation to these lands, bound by the restrictions of the act of Congress, and that the children of the respective townships were the beneficiaries. In *Perkins and Chilcutt v. Reed*, 1 Swan, 87, it was held, "that both the State and commissioners are mere trustees for the common schools of the township."

Congress, however, by the act of 1843, ch. 346, authorized the State to convert the school lands into a fund for the support of schools, by sale, provided the consent of the inhabitants should be first obtained. By the 2d section of this act, if the Legislature should deem it inexpedient to sell, provision might be made for leasing for any term "not exceeding four years."

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Our Legislature, by act of 1844, ch. 104, amended by that of 1846, ch. 121, made provision for the sale of the common school lands, in pursuance of the power given by the act of Congress of 1843 above cited. A vote of the people is to be taken upon the question of selling, and if a majority fail to vote, a commissioner may be appointed by the County Court to ascertain the will of the people by personal application to each voter for his signature to a paper properly headed for that purpose; and if it appears by either mode that a majority of the qualified voters of the township are in favor of the sale, that fact is to be certified to the Circuit Court, and it is made the duty of the Judge to order a sale on the terms prescribed. Before the sale is made, the lands are to be valued, and are not to go for less. By a proceeding under these acts, the land in question was sold on the 25th of July, 1850, by the clerk, to Euclid Waterhouse and others, for \$1,770, that being the highest and best bid. It was certified to the Circuit Court of Polk county, at its February Term, 1850, that it was ascertained by the report of a commissioner appointed for that purpose, that a majority of the voters were in favor of the sale; and the order to sell was then made. The sale not having been made for some reason, the order was renewed at the June Term, and executed on the 25th of July, 1850, as stated.

On the 4th of February, 1850, before the order of sale by the Court, but after the vote of the people, the Legislature enacted, ch. 181, § 5, that the common school commissioner of "Polk county" should have power to lease, for mining purposes, any unsold school lands, on such terms as in their judgment would be most condu-

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cive to the interest of their common schools. In May, after the decree for the sale in the preceding February, the commissioners made a lease of this land to Caldwell and Symons for *ninety-nine years*, in the supposed pursuance of the power given them by the last act. Whereupon these lessees filed a bill in the 'Chancery Court to enjoin the sale under the order of the Circuit Court, and the injunction was granted so far as such sale might or could affect their lease. On the day of sale, this lease and injunction were read to the people, and the land was sold upon that notice. These facts were all reported to the Court; and no exceptions being made, the report was confirmed at the October Term, 1850.

Soon after this, the purchasers sold the land at a large advance, and assigned their certificate of purchase to Charles Congden and associates, of New York, through their agent, Samuel Congden, there upon the ground; and having full knowledge of all the facts. The said Charles Congden having paid the original purchase money, \$1,770, and holding the certificate of purchase by assignment, obtained a grant from the State on the 23d of February, 1853. The first purchasers made no warranty of title, notwithstanding the large advance made on their bid by Congden. The bills and cross-bills between the lessees and purchasers were all compromised and settled by the purchase of the lease by Congden. Having thus concentrated in himself both titles, an act of incorporation was procured from the Legislature, and the property passed over to the "Tennessee Mining Company," consisting of the said Charles Congden and some other stockholders, by whom it has.

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been put into successful mining operation, and is now, and has for several years been worked on a large and profitable scale, as one of the celebrated "Duck Town Copper Mines."

Two preliminary objections are made to the relief sought in the bill:

First. That this is a bill of review, and consequently is barred by the lapse of three years from the confirmation of the sale in the Circuit Court. We do not consider it a bill of that character. Its object is to impeach and set aside the proceeding entirely, and not to review and correct it. It assumes that the sale was not only erroneous, but void. The jurisdiction given to the Circuit Court in the case is not so much judicial as ministerial. There are no pleadings, no questions for adjudication, no power to decide upon the propriety of selling, or the terms of sale, or even the minimum to be fixed; all this is done under the statutes by other machinery. It is more like the jurisdiction to condemn land to be sold for taxes, upon the report of a collector, than a suit. If it be certified to him, that the sense of the people has been ascertained in either of the modes prescribed, and that a majority are for the sale, it is made the duty of the Circuit Judge to order it without question; and confirmation would be a matter of course, unless something should have occurred in making it that would render it improper. He is not even required to pass the title by decree; that goes by the certificate of purchase, upon which a grant is to be issued when the consideration is paid. Such are the provisions of the statutes referred to. The legality of the sale must depend upon the circumstances attending

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it, and the conformity of the previous steps to the requirements of the statutes. The Circuit Judge would doubtless have power to set aside the sale for good cause; but a failure to do so does not close the question as an adjudication, as in ordinary suits, unless opened by a bill of review, or other prescribed mode of proceeding in the regular practice. The validity of the title procured must still depend upon the facts of the case.

Second. It is contended that the grant of the State closes all questions, and cures every imperfection in the anterior proceedings, and is conclusive upon the title. It is a general rule that the State's grant of her own lands cannot be questioned upon any matter behind it, by any one whose interest or claim originated subsequently. But a grant may be set aside in favor of an older special entry upon which a younger grant has issued. Here there was an older claim—the land had been legally set apart for common schools, and vested in commissioners for that purpose. And, besides, this land did not belong to the State, but was only held in trust. There are two grounds, then, upon which this case is distinguished from those to which the rule referred to applies.

These difficulties being out of the way, the case is open to investigation upon its merits. And the questions presented are, whether the sale under the order of the Circuit Court was good in law, and sufficient to pass the title; and if not, whether the lease was valid and binding upon the complainants.

1. As to the sale. Various objections are made in the bill, and perhaps sustained by the proof, in relation

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to the mode and manner of obtaining the sense of the people on the question of sale, and to the qualification of the voters. We need not now determine whether these can be examined, as they preceded the order of sale, but a reference to them is enough to excite strong suspicion that all was not fair, and that much undue influence and exertion were used to divert this bounty of the general government from the laudable purposes designed, and appropriate it to individual uses. It appears that men were employed to canvass the district, for the purpose of making public and private speeches to convince and persuade the people to vote for the sale. But independent of this, enough appears to render the sale and the title derived from it null and void. There was no law authorizing the sale of school lands already leased. It is no sufficient answer to this objection that the lease was invalid, if such was the fact. A Court of Chancery had so far recognized it as to enjoin the sale. True, the Circuit Court had ordered the sale in February, but in May the commissioners had so far changed their purpose as to grant a long lease, and the Chancellor had forbidden the sale upon that ground. If the Clerk of the Circuit Court, under these circumstances, went through the forms of a sale, it was nothing more than a form, and could have no effect upon the title so as to change it. It was a fraud upon unborn infants, and cannot be allowed to deprive them of their rich inheritance. The purchasers, with a full knowledge of these facts, could claim nothing by their purchase, nor transmit any right to others by a transfer of the certificate of purchase. There is no pretence but that these facts were all well known to the Congdents at the

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time of their purchase, and that this knowledge would equally affect them and their associates, as corporators as well as individuals. It was a flagrant breach of trust on the part of all concerned, and cannot be permitted to stand. That the Circuit Judge would confirm a sale made under such circumstances can only be accounted for on the ground that it was regarded as a matter of course, uncontested proceeding to which his attention was not directed.

But after a brief contest in the Chancery Court between the lessees and purchasers, in which each impeach and declare void the claim of the other, they fall into a harmonious arrangement, by which the lease is sold and transferred to the purchasers, and the two claims are united in "Congden and associates," and pass to the new corporation called the "Tennessee Mining Company." So it is contended, that if their title is not in fee under the sale and purchase, it is good for ninety-nine years under the lease. This position we consider equally unavailing, and less plausible than the other.

It is true, that by the act of February 4, 1850, ch. 181, sec. 5, the Legislature authorized the commissioners to lease for mining purposes any "unsold" school land in Polk county, and that this land was then unsold. But the defendants assume that all the power of the people, at the instance of the commissioners, had then been exerted, under the acts of 1844 and 1846, in favor of a sale, and that the same was conclusively and legally settled—nothing remaining to be done but to carry out the will of the inhabitants of the district, by a matter of course order of the Circuit Court, and a formal sale by its clerk. Could the act be construed to apply to such a

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case? Was it intended to set aside the decision of the people in favor of a sale, upon the judgment of the commissioners in favor of the policy of leasing? It is a little suspicious that the Legislature should have thought it proper to change the general policy settled in 1844 and 1846 in relation to a *sale* of the common school lands, and to pass this special and pointed act in relation to leasing at that particular time; and still stranger that these commissioners should have changed their views so suddenly, and adopted a course directly in conflict with the will of the people so recently expressed upon their motion. But all that is immaterial. They had no power to make such a lease under any law. Waiving the objections just stated, based upon the assumptions of the defendants in support of their title under the sale, the lease is void for want of authority of law. The act of Congress of 1843, ch. 346, did, in case the Legislature should deem it inexpedient to sell, authorize provision to be made for leasing for any term "*not exceeding four years.*" Our act of February, 1850, authorizes the lease, but prescribes no term. The Legislature, acting under a trust, would be bound by its restrictions, and could not disregard them. But that is not attempted by the act, but only by the commissioners. The lease, then, for ninety-nine years, being in contravention of the act of Congress, is void, and confers no rights upon the defendants.

The result of the whole case is, that the title is still in the complainants, as common school commissioners, for the benefit of the children of District No. 8 of Polk county "for ever;" and that the defendants will be held to account for all the net profits made by them out of the said mines, or as renters, at the option of complain-

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ants; the election to be made after the taking of the account in both aspects. A decree will be drawn up to this effect, and the case remanded to the Chancery Court for the stating of the account and final proceedings.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

MIDDLE DIVISION.

NASHVILLE: DECEMBER TERM, 1858.

W. B. SAUNDERS *et al.* v. B. W. HARRIS *et al.*

1. HUSBAND AND WIFE. *When a conveyance is a fraud upon the marital rights.* Whether a conveyance is a fraud, or not, upon the marital rights depends on the circumstances of each case, the conveyance of an unmarried woman, although made immediately before marriage, being *prima facie* good. In this case the husband, previous to the marriage, represented himself to be a man of wealth, when in fact he was insolvent. He was apprised of the conveyance shortly after the marriage, and took no steps to have it set aside. He set up no claim to the negroes, but recognized the right of his wife under the conveyance. Held, that the conveyance was not a fraud upon the marital rights of the husband, and is valid.
2. TRUST AND TRUSTEE. *Trust may be created by parol.* A trust in slaves may be created by parol.
3. SAME. *Acceptance by the trustee and cestui que trust.* A deed of trust being made for the benefit of the *cestui que trust*, the assent of the trustee is not necessary to its validity. If he refuse to execute the trust, a Court of Chancery will execute it for him. The assent of the *cestui que trust* may be given at any time after the deed is made, and will always be presumed, in the absence of proof to the contrary.
4. SAME. *Terms that exclude the marital rights. Case in judgment.* If an absolute bill of sale of slaves is made by a *feme sole*, in contemplation of marriage, for the sole purpose of securing said slaves to her, free from the acts of her intended husband, a trust is thereby established in favor of the wife. In 1818, certain slaves were conveyed by a *feme sole* to her brother, in contemplation of marriage, for the purpose of securing said slaves to herself, free from the control and debts of her husband after marriage. The conveyance was absolute upon

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its face. After the marriage, the husband recognized the right of his wife to the slaves conveyed. Held, that this was a valid trust, and that the slaves were secured to the sole and separate use of the wife, and belonged to her upon the death of her husband, she surviving.

FROM WILSON.

Decree by RIDLEY, Chancellor, dismissing the bill at the July Term, 1858. The complainants appealed. The facts are fully stated in the opinion of the Court.

GUILD and MARTIN, for the complainants.

HATTON, for the complainants, argued.

1. The bill of sale made by Levisa Bowen to John H. Bowen was never delivered. She retained it, and from the time of its execution, until some two years after her marriage with Major Saunders, it is not again heard of. And the deed not being delivered, and unregistered, was wholly inoperative. The dominion of said Levisa, then, at the date of her marriage, continued as perfect as it ever was over the property. *Brevard v. Neely, Trustee, &c.*, 2 Sneed R., 169.

The marital rights of the husband are secured to him by law, because it charges him with burthens, which are the consideration he pays for them. They are rights, such that fraud may be committed upon them. 2 Bro. C. C., 345; Bright on H. & W., vol. 1, 229. The bill of sale to John H. Bowen being "*wholly inoperative*" for want of delivery, did not the marital rights of Major Saunders attach upon his marriage? Such title as

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she had certainly passed to him. The legal title had not passed out of her. Was it not then vested in him?

2. If the bill of sale had been delivered to John H. Bowen, and accepted by him, it still would have been ineffectual as against the marital rights of Major Saunders; it having been executed during the contract of marriage, without his knowledge, and kept secret from him until after the marriage was solemnized, and so far as the proof shows, for years afterwards. See Bright on H. & W., vol. 1, page 221-2-6; Roper on H. & W., 163; *Logan v. Simmons*, 1 Ired. Eq. R.; 1 Russ., 485.

3. But if the bill of sale was good to pass the absolute title to the slaves to John H. Bowen, Major Saunder's title to them was made good by an adverse holding of thirteen years on his part, against said John H. and every other person.

4. It is admitted that a deed or bill of sale absolute on its face has in certain cases, as between the parties to the same, or their privies, by clear and explicit proof, been shown to have been intended to create a trust or mortgage. But it is insisted, that in no case similar to the present has this Court or any other, held any such doctrine. The party here proposed to be affected by the alleged trust is a third person, wholly ignorant of the execution of the instrument, as well as of the purposes had in view by the person executing it.

Lord Nottingham, in *Cook v. Fountaine*, 3 Swanst. R., 591-2, speaking of implied trusts, says: "There is one good, general, and infallible rule that goes to both these kinds of trusts. It is such a general rule as never deceives; a general rule to which there is no ex-

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ception, and that is this; *the law never implies—the Court never presumes a trust, but in case of absolute necessity.*” The doctrine of resulting trusts, we learn from Mr. Story, (Eq. J., sec. 1195,) is based on principles of equity; the office of such a trust is to prevent the party upon whose “conscience” the trust is “forced” from protecting himself by the technical rules of the common law, “in cases of meditated fraud, imposition, &c.” This being so, shall the jurisdiction of a Court of Chancery be invoked to declare and support a trust upon an instrument, the object of which is to defraud a husband of his just rights? This is not a case for the application of such a doctrine.

5. If a trust can be created by implication, in favor of the said Levisa, in John H. Bowen; and if, as is insisted by counsel, the record shows that John H. Bowen undertook to hold the property as trustee; still, Major Saunders, having held these negroes for more than three years adversely to the said John H., and with the knowledge of said John H., obtained by virtue of such adverse holding a perfect title, both as against the trustee, and Levisa, the *cestui que trust*. 8 Hum. R., 568; 1 Sneed R., 297. It cannot be presumed of Major Saunders, as was presumed of Davis, in the case of *Foster et al. v. Jordan et al.*, 2 Swan R., 476, that he held these negroes subject to the title of John H. Bowen, or to any equity in his wife; the proof being abundant in the record of a holding by him unmistakably hostile to the claims of all persons whatsoever.

6. If the legal title ever vested in John H. Bowen, by an acceptance of the bill of sale with an implied

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accompanying trust, he could not denude himself of such trust, except by decree of a competent Court.

If then, after accepting the trust, he simply declined any active control of the property, this would not present a case where the husband, by operation of law, would become trustee of the wife.

7. The doctrine of estoppel can only apply where some declaration is made or act done, to influence the conduct of another in his dealings, and which actually leads him into a line of conduct which must be prejudicial to him, unless the party so misleading him be prevented from asserting a right in conflict with his rights. *Decherd v. Blanton*, 3 Sneed R., 373; *Dazell v. Odell*, 3 Hill, 219. To justify the application of this doctrine, it is material that the party proposed to be estopped should be fully aware of his rights, and should intentionally or by gross negligence encourage or influence the purchase; and that the purchaser should not be aware of the true state of the title; and *that the proof showing all these things shall be full and satisfactory.* *Morris v. Moore & Hancock*, 11 Hum. R., 433; Story Eq. J., sec. 386.

8. An examination of the record will show the Court, we think, that the argument of counsel for the defendants, that the question now presented is *res judicata*, is barely plausible, much less conclusive of the case.

HEAD and TURNER, for the defendants, contended:

1. That although the conveyance to John H. Bowen

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on the 8th of March, 1813, is absolute on its face, yet it was intended to secure the woman, Lydia, and her increase to the sole and separate use of Mrs. Saunders; and that such a trust can be created by parol, and will be sustained by a Court of Equity. *Eaves v. Gillespie*, 1 Swan, 128; *Smitheal v. Gray*, 1 Hum., 495; *Boyd v. McLean and wife*, 1 Ire. C. R., 582, 128; *Pritchard v. Wallace*, 4 Sneed, 408; *Elias et al. v. Smith et al.*, 6 Hum. 33.

2. If such was the object of the conveyance of the 8th March, 1813, and such a trust can be created by parol, the title of Mrs. Saunders was perfect, unless there is something else in the case by which it can be avoided. Although the conveyance may have been made without the knowledge or consent of Saunders, yet his unembarrassed circumstances fully authorized the step. It was a meritorious act, and necessary for the protection of the wife. It was not, therefore, in fraud of the marital right. *St. George v. Wake*, 7 Con. Eng. Ch. R., 194.

Again: Saunders fully recognized the validity of the conveyance after the marriage. He ratified what was done, and took no steps during his life to have it set aside. Its validity cannot now be questioned. *Bright on Hus. and Wife*, 228.

Although the legal title to the slaves Lydia and increase was conveyed to J. H. Bowen, yet the slaves continued in the possession, and under the control of Saunders and wife, until his death; but the statute of limitations did not vest title in Saunders for two reasons:

1. By the terms of the trust, Mrs. Saunders had a right to the possession of the slaves. They were intended for her sole and separate use. The possession of her hus-

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band could not, therefore, be adverse. *Foster v. Jordan*, 2 Swan, 476, 480.

2. The proof conclusively shows that the slaves were never adversely held by Saunders. The general understanding of the neighborhood; the embarrassed condition of Saunders, coupled with the fact that no efforts were made to take said slaves for his liabilities; and his repeated declarations that the slaves were not his, clearly establish that there was no adverse holding.

We further insist, that the possession of Saunders, if it was ever adverse, was broken after the death of J. H. Bowen. That upon the refusal of Bowen to act as trustee, or upon his death, the husband, Saunders, became trustee for his wife by operation of law; and as trustee of his wife, his possession could not be adverse. She was under the disability of *coverture*; and as between the *cestui que trust* and trustee, the statute of limitations will not run in favor of the latter, while the former labors under a disability. Hill on Trustees, 420; *Hamilton v. Bishop & Fly*, 8 Yer., 40-41; 1 Ired. Eq. R., 423; 2 Ired. Eq. R., 321.

It is further insisted for the defendant, that as a decree has been pronounced recognizing the validity of Mrs. Saunders' title to Lydia and increase, in a proceeding in which all the persons now litigating were parties, and the complainants, by their sworn answer, admitted the same fact, they are now *estopped* from controverting that title, more especially since they do not claim to have been ignorant of the condition of their title. 1 Brock. R., 126; *Estill v. Taul*, 2 Yer. 469; 10 Yer., 471; 1 Johns. Cases, 492; 1 Swan, 329; 7 Hum. 408-9.

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STOKES, for the defendants, said :

Major Saunders had no title to Lydia and her increase at the date of his will.

1. The slave Lydia and her increase were conveyed by Mrs. Saunders, before her intermarriage with Major Saunders, to her brother John H. Bowen, in trust for her sole and separate use, free from Major Saunders' control.

The bill of sale is absolute, and apparently for a consideration; but nothing was paid. A trust to the separate use of a married woman may be created and proven by parol. *Eaves v. Gillespie*, 1 Swan, 130. Such trust may be established by parol where no consideration passes from the grantor. *Elias v. Smith*, 6 Hum., 33. An absolute bill of sale may be converted into a mortgage by parol. Why may not a trust for a married woman?

A trust may be created and proven by parol in relation to land, where there is an absolute deed. 6 Hum., 99; 8 Hum., 466; 10 Hum., 12. The 7th section of the English statute of frauds is not in force here. The statute of frauds has no application to personality. A valid trust of such property may be created by parol. Hill on Trustees, 57.

The language proven by Mr. Bowen, Mrs. Harper, and Mrs. Campbell, is sufficient to create a separate estate in Mrs. Saunders. *Hamilton v. Bishop & Fly*, 8 Yer. 40; *Brown v. Brown*, 6 Hum., 127; Hill on Trustees, side pages 420-1, and note.

The bill of sale, with this parol trust, cannot be attacked for fraud on the marital rights of Major Saunders.

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Major Saunders was insolvent, and concealed the fact. This would have precluded him from setting it aside. *Jordan v. Black*, Meigs' Rep., 148. Major Saunders took no steps to set it aside in his lifetime. It cannot now be done by his legatees, so as to give him the title at the date of his will. *Logan v. Simmons*, 1 Dev. & Bat. L. R., 13. His long acquiescence creates the presumption that he ratified it, or had knowledge of it before the marriage. 1 Lead. Ca. in Eq., top p. 351.

It will be said that Bowen refused to accept the title with the trust, and for this the trust is inoperative. Wm. R. Bowen proves an express acceptance. Equity will not permit the trust to fail for want of a trustee. When Bowen declined—if he did do so—Major Saunders became *eo instanti* trustee for his wife. Hill on Trustees, side p. 420.

If these positions are correct, the question on the statute of limitations cannot arise. Mrs. Saunders was entitled to the possession as *cestui que trust*. Her husband could not, by the same possession, defeat her separate estate. *Foster v. Jordan*, 2 Swan, 476. Major Saunders set up no adverse claim during the lifetime of John H. Bowen. On the death of Bowen, he became trustee of his wife, by operation of law, and could not then hold adverse. The husband can acquire no title to the wife's separate property by an adverse holding begun after the marriage.

2. Aside from the idea of a parol trust, Major Saunders had no title to the slaves at his death.

Mrs. Saunders conveyed all her title to Bowen by the bill of sale. This conveyance was valid as against Major Saunders until declared void by a Court of Equity; which

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was not done. His marital rights did not attach to the slaves. Bowen never reconveyed to Major Saunders or his wife. Major Saunders never had three years continuous adverse possession of the slaves.

3. The decree in the case of *Ward, Adm'r, v. Saunders and others* is a conclusive adjudication on the question of title involved in this case.

It is most apparent that Mrs. Saunders' title to Lydia and her increase was involved, and that the decree fixes the title in her. The decree is in full force on these points, and is conclusive on complainants. 2 Meigs' Dig., 1473; 10 Yer. Rep., 471; 2 Yer. Rep., 469; 1 Brock., Rep., 126; 1 Johns. Ca. 492; Story's Eq., Plead., p. 791, note 1. Complainants could have relied upon the title they now set up as a defence in the above suit; and having failed to do so, they are forever precluded from it. 1 Johns., Ca., 492, 502; see also *Dyson v. Leek*, 5 Strob. Eq. Rep., 143; *Hurt v. Hurt*, 6 Rich. Eq. Rep., 120.

W. F. COOPER, Special J., delivered the opinion of the Court.

The controversy in this case is in relation to a certain negro slave named Lydia and her descendants. The complainants claim that she was the property of their father, James Saunders, deceased, and passed with her increase under the provisions of his will. The defendants insist that she was held in trust for the sole and separate use of Levisa Saunders, the wife of James

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Saunders; and that she and her increase were rightfully disposed of by the said Levisa, subsequent to her husband's death. The record is voluminous, and the facts complicated, but we are able to gather the following detail of events, in the order of time in which they occurred.

On the 23d of March, 1813, James Saunders intermarried with the said Levisa, then Levisa Bowen. Under the will of her deceased father, upon a division of his estate, the said Levisa had received the negro woman Lydia, and two children, Charles and Lucinda. James Saunders was a widower from the State of Georgia, with a family of children by his first wife, and, as it turned out, without property and wrecked in fortune. On the 8th day of March, 1813, the said Levisa, in contemplation of marriage, executed to her brother, John H. Bowen, a bill of sale for the said negroes, purporting to be in consideration of seven hundred dollars, but in reality without any consideration actually passing. The bill of sale was in the ordinary form, and was attested by Mary H. Bowen, the mother, and Catharine Campbell, the sister of the said Levisa. The circumstances under which it was made will be presently stated more at large. This bill of sale was, subsequently, at the request of the said Levisa, and at the August Term, 1815, of the County Court of Sumner county, proved by the subscribing witnesses, and registered in the register's office of the same county on the 17th of November, 1815. The record contains, also, another instrument, purporting to be a deed from Levisa Bowen to her mother, Mary H. Bowen, for a tract of land in Sumner county, containing 640 acres. This deed

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bears date the 10th of November, 1811, purports to be in consideration of one dollar, and is attested by David Campbell and John H. Bowen, attesting witnesses. Its execution seems to have been duly proved by these attesting witnesses, before the Circuit Court of Sumner county, on the 17th of March, 1813, and was registered in said county on the 1st of June, 1813. There is no proof in the record in regard to the object of this deed or the circumstances attending its execution.

James Saunders and wife resided, for a few months after the marriage, at the house of Mary H. Bowen, the mother of the said Levisa, and then removed and settled upon a part of the land devised to the said Mary H. by her deceased husband; where they continued to reside until the death of James Saunders, early in the year 1827. In the meantime, the negro Lydia and her children continued in the possession of James Saunders and wife, the said Sanders exercising the usual acts of ownership over them. Shortly after Saunders and wife commenced housekeeping, Mary H. Bowen furnished them with a negro girl named Molly; and this girl also remained with them until the husband's death; Mrs. Bowen, occasionally, and for a short time, resuming the possession. In the year 1827, Mrs. Bowen also departed this life, having first made her will, bequeathing the negro Molly to her daughter Levisa for life, and after her death to her children. John H. Bowen died on the 25th of September, 1822.

James Saunders seems to have been an industrious man, who made a support for his family, although addicted to the intemperate use of ardent spirits. There seem to have been rumors of debts existing against him

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in the State of Georgia, upon old transactions; and inquiries seem also at one time to have been made, with a view to ascertain the prospect of collecting some of these debts. He appears to have freely admitted the fact that he had been broken up by unfortunate speculations and endorsements in that State, and was sometimes pressed by pecuniary liabilities of more recent creation. Towards the end of his life, he accumulated some property around him, chiefly in the form of cattle and fine stock. By his last will, duly proved at the February Sessions, 1827, of the County Court of Sumner county, he gives his "little goods and property" to his wife Levisa, to be kept together to raise his children, and for her ease and comfort, with power, as each child married, to loan said child "what seems reasonable to spare of said property;" and at her death, all the property loaned or remaining to be equally divided between his two daughters and four sons, viz.: Mary Hendly, Tabitha Moore, Wm. Bowen, James Yancy, John Henry, and Samuel Adams Saunders. No executor having been named in the will, Levisa Saunders was, at the same term of the County Court, appointed administratrix with the will annexed, gave bond in the penalty of nine hundred dollars, and returned an inventory of personal effects, in which no negroes are mentioned. At the expiration of the two years allowed by law for settling the estate, commissioners were appointed to settle with her; and they make settlement with her accordingly, charging her with \$339.68 of assets, and crediting her with \$324.75 of disbursements; leaving in her hands \$14.93 in money, and \$260 in notes "which cannot be collected."

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After the death of James Saunders, his daughter, Mary Hendly, intermarried with John W. Perdue, and then died, leaving her husband and James Y. Perdue, an only child, her surviving. After her death, and about the year 1836, James Y. Saunders, one of her brothers, departed this life intestate, and without ever having married. On the 26th of February, 1839, Tabitha Moore, the other daughter of James Saunders, intermarried with Baker W. Harris, and departed this life in 1844, leaving her husband and three children her surviving. Baker W. Harris was qualified as administrator of his deceased wife, and also, as administrator of his deceased sister-in-law, Mrs. Perdue. Wm. B. Saunders was qualified as administrator of James Y. Saunders.

After her husband's death, Levisa Saunders continued in the possession of Lydia and her increase, and of Molly and her increase. Shortly after the intermarriage of Baker W. Harris with her daughter, she gave Harris and wife a negro woman, a child of Lydia, named Sarah Ann, and her two children, Henry and Lydia. Harris and wife settled in Wilson county; and the said Levisa being anxious to follow them, her surviving sons Wm. B., Jno. H., and Sam'l A. Saunders, and the said Harris and wife relinquished to her all their interest in the tract of land in Sumner county, on which she was then living, and in which she had only a life estate under the will of her mother, with remainder to her children. In order to effect a sale of this land, her son, Wm. B. Saunders, and the said Harris joined her in warranting the title, she undertaking to indemnify them from liability by reason of the interest of James Y. Perdue, the infant son of her deceased daughter, by a provision

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to that effect in her will, which was done accordingly. The land was sold, and the said Levisa bought a part of Harris' land in Wilson county; and paid him partly in a negro named Jack, and a negro woman named Caroline, and her child Lydia; all of whom were descendants of old Lydia. The bill of sale to these slaves was made on the 20th of May, 1843. The tract of land thus bought, was, after Mrs. Saunders' death, sold as a part of her estate, and the proceeds were divided among her legatees, under the provisions of her will. In the year 1843, Mrs. Saunders sold to one Carter, for \$800, a negro boy named Aleck, a son of old Lydia, the bill of sale being witnessed by Wm. B. Saunders, one of her sons; and the sale having been made with the knowledge and approbation of the other sons, two of the sons expressly telling the purchaser that their mother had the absolute title to Lydia and her descendants; and stating at the same time, that she had only a life estate in Molly and her increase. Upon this subject, the proof is entirely conclusive that Mrs. Saunders and her sons considered Lydia and her increase as the exclusive property of Mrs. Saunders, and Molly and her increase as only belonging to Mrs. Saunders for life, under her mother's will. After all these gifts and sales, Mrs. Saunders still had, at her death, old Lydia and Nelson, Lucinda and Mary Gray, her children and six or seven of Lydia's grand-children.

Mrs. Saunders died on the 5th day of September, 1851, having made a will directing that her two servants, Lydia and Molly, have the privilege of living with whomsoever they pleased; and that all the rest of her negroes be equally divided between her three sons, Wm.

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B., John H., and Samuel A. Saunders, and her grandson, James Y. Perdue; but providing that her grandson should not receive his portion of the estate, unless he signed the deed to the tract of land sold by her as aforesaid; and, in the event he failed to do so, that his share go to the indemnity of those who joined her in the warranty of title.

In April, 1852, Henry Ward, as administrator with the will annexed of Levisa Saunders, filed his bill in the Chancery Court at Lebanon, against her sons, grandson, and B. W. Harris in his own right, and as administrator of his deceased wife, and against Harris' children, for a construction of the will, and instructions as to his duties; and suggesting as his chief difficulty, that he did not know what disposition to make of Molly and her increase, under the provisions of the will of Mary H. Bowen. He also asks instructions as to the disposition of Molly and Lydia, under Mrs. Saunders' will, and of James Y. Perdue's share, until he should comply with the condition above mentioned. To this bill, a joint answer was filed by Wm. B., John H., and Sam'l A. Saunders, and James Y. Perdue by Wm. B. Saunders, as his guardian, admitting the facts stated, and claiming that Mrs. Saunders had an absolute interest in Molly and her increase, by virtue of the provisions of her mother's will. This answer contains, also, the following clause: "Not only law, but justice requires that the provisions of the will of the said Levisa shall be carried out; because, during her life, she had given to the said B. W. Harris negroes and other property, more in value than will be the legacies of respon-

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dents, provided the provisions of said will are carried out."

Harris answers for himself, and as guardian of his children, insisting that Mrs. Saunders took only a life estate in Molly and her children, and that he, as administrator of his wife, is entitled to her interest in said slaves.

Various proceedings were had in this cause, during which it came twice to this Court. (See *Ward v. Saunders*, 2 Swan, 174, and 3 Sneed, 387;) and it was finally decided that Molly and increase passed under Mary H. Bowen's will to her daughter, Levisa Saunders, for life, and after her death, to her children; and they were divided accordingly.

In the meantime, during the pendency of that litigation, on the 24th of June, 1853, the original bill in the cause now before us was filed. The bill is filed by Wm. B., Jno. H., and Samuel A. Saunders, and James Y. Perdue by Wm. B. Saunders, his guardian, against Baker W. Harris; sets forth the will of James Saunders, deceased; and claims that Lydia and her increase passed under its provisions to Levisa Saunders for life, and after her death to her children. It also states, that the negroes hereinbefore spoken of as having been given by Levisa Saunders to B. W. Harris and wife, were only loaned; and asks that they and their increase be attached, and, upon final decree, divided among those entitled under James Saunders' will. Harris answers, setting forth his marriage, the gift of the descendants of Lydia to himself and wife, the sale of the negro Alexander, of the land in Sumner county, and the proceedings under Ward's bill as hereinbefore detailed, and in-

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sisting that Lydia and descendants were the absolute property of Levisa Saunders, and were not a part of James Saunders' estate. The answer also claims that Lydia had been conveyed by Levisa to her brother, Jno. H. Bowen, in trust for her, and that she and her increase had been held in trust accordingly.

On the 24th of June, 1856, an amended bill was filed for the purpose of making Wm. B. Saunders, as administrator of James Y. Saunders, deceased, a party complainant, and B. W. Harris, as administrator of Mary H. Perdue, a party defendant. On the 7th of January, 1857, James Y. Perdue having come of age, was permitted to become a defendant instead of a complainant; and thereupon he filed his answer electing to comply with the conditions of the will of Levisa Saunders, and to take his share of the estate. He insists that complainants, by their answer to the bill of Henry Ward, administrator as aforesaid, recognized the absolute title of Mrs. Saunders to Lydia, and that they should be held to this admission. He makes his election, he says, upon the supposition that Lydia and descendants belonged to his grandmother; for otherwise there would be nothing to distribute except the proceeds of the land sold and the perishable property; and in that contingency, he does not wish to compromise his right to sue for his share of the Sumner county land.

Upon the hearing, the Chancellor dismissed the bill; and the complainants have appealed.

In the view which we have taken of this case, it was, perhaps, unnecessary to set forth the facts with the minuteness of detail adopted, but the statement shows the light in which the parties themselves viewed

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the transactions the Court is called to pass upon, and tends to strengthen the correctness of the conclusion to which we have arrived.

The rights of the parties turn, chiefly, upon the validity and effect of the conveyance of Lydia and her children to Jno. H. Bowen, on the 6th of March, 1813. On behalf of the complainants, it is insisted that the conveyance was a fraud upon the marital rights of the intended husband, and therefore void; that the instrument was never delivered to nor accepted by John H. Bowen; and that there is not sufficient evidence of a trust to the separate use of Levisa Saunders. The correctness of these positions is denied by the defendants, and must be settled by the Court.

It is not every alienation of the wife's property, during the treaty of marriage, which can be regarded as fraudulent, only because the husband was not a party to it. This was conceded by the Court in *Jordan v. Black*, Meigs, 142; and it was stated, in that case, that the meritorious object of the conveyance, or the situation of the intended husband in point of pecuniary means, would form exceptions to the general rule. Whether there is fraud or not upon the marital rights must depend on the circumstances of each case, the conveyance of an unmarried woman, although made immediately before marriage, being *prima facie* good. *England v. Downs*, 2 Bear., 522. In this case, the proof leaves little doubt that James Saunders had, previous to the marriage, represented himself as a man of wealth, when, in fact, he was without property and insolvent. It is, moreover, certain that although Saunders knew of the existence of the conveyance shortly after the mar-

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riage, he took no step to set it aside; nor does he seem, at any time afterwards, to have set up a claim to the negroes, except on one or two occasions when under the influence of liquor, and with a view to annoy his wife. His creditors made no effort to subject these negroes to the satisfaction of their debts; and it is in evidence that he told some of them, when interrogated upon the point, that the negroes were not his, but belonged to his wife. Under these circumstances, we do not think, either upon principle or authority, that there is any pretence for holding the transaction void, as a fraud upon the marital rights of the husband. *Hunt v. Matthews*, 1 Vern., 408; *St. George v. Wake*, 1 Myl. & K., 610.

The proof of the circumstances under which, and the object for which the conveyance to Jno. H. Bowen was made, is found exclusively in the depositions of Catharine Campbell, one of the attesting witnesses and a sister of Levisa Saunders, and of Wm. R. Bowen, a brother of the said Levisa. Mrs. Campbell is a witness examined on behalf of the complainants. She proves that the bill of sale was made at her suggestion, because, to use her own words, "there was a rumor that Major Saunders was inclined to be dissipated;" and "solely for the reason that we thought in that way we would secure them (the negroes) to my sister Levisa, free from the control of Major Saunders." The witness further states that John H. Bowen was not present when the bill of sale was executed; and when informed of the fact, which, she thinks, was not until after the marriage, remarked to her "that it would have been best to have been open and above board," and secured the negroes to his sister by

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marriage contract. "He did not say to me," adds the witness, "that he disapproved of the bill of sale, that I now remember." She further states that the bill of sale was kept either by Mary H. Bowen or Levisa, and was subsequently, at the request of the latter, proved and registered as before stated. Wm. R. Bowen proves that the conveyance was made for the purpose of securing the negroes for his sister Levisa, free from Major Saunders' debts; and that he and John H. Bowen were consulted, and advised his sister to this course. The credibility of this witness is attacked, not by bringing forward witnesses to prove that they would not believe him on oath, but by showing, by the testimony of others, that some of the statements of fact made by him in his deposition are not reliable. And it must be admitted that the testimony adduced goes very far towards establishing the point aimed at. It will be noticed, however, that he is fully sustained by Mrs. Campbell, complainants' own witness, in his statement of the object of the transaction. The circumstances, moreover, tend to sustain him in his recollection that John H. Bowen advised, or, at any rate, knew of the existence of the deed before the marriage; for it is shown by the certificate of probate to the deed of Levisa to her mother for the 640 acre tract of land, as before recited, that John H. Bowen was, on the 17th of March, 1813, only a few days before the marriage, at Gallatin, in the county of Sumner. This fact is inconsistent with Mrs. Campbell's recollection that he was not in the county at the time of the marriage, and was shocked when he heard of it—not when he heard of the execution of the bill of sale to him, as was ingeniously, but erroneously argued by the complainants' counsel. It

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is much more probable, and perfectly consistent with all the facts, that John H. Bowen was shocked when he heard of the engagement, and advised the course that was actually pursued. We have little doubt, from all the facts, that John H. Bowen did actually assent to the transaction. But whether he did or not, it distinctly appears from the testimony of Mrs. Campbell that he did not positively renounce the trust; and without such renunciation, his acceptance will, under the circumstances, be presumed. It may be added that his acceptance was not so material as seems to be supposed. "A deed of trust," says Judge TURLEY in *Field v. Arrowsmith*, 3 Hum., 446, "being always made for the benefit of the *cestui que trust*, the assent of the trustee is not necessary to its validity. It is true he may refuse to execute the trust, but, in that case, a Court of Chancery will execute it for him; and the assent of the *cestui que trust* may be given at any time after the deed is made, and will always be presumed in the absence of proof to the contrary." These positions are fully sustained by authority. 2 Story's Eq., 1058, 1061; Co. Litt., 113, a, note 2. The acceptance of the *cestui que trust* in this case is sufficiently evidenced by the execution of the instrument. The evidence of Mrs. Campbell leaves it doubtful in whose hands the bill of sale was left; whether it remained in the possession of Levisa or her mother. It is, however, wholly immaterial. The execution of the instrument for the purposes intended being distinctly established, a formal delivery is not important. *Farrar v. Bridges*, 5 Hum., 412; 4 Kent Com., 455, 1 Meigs' Dig., p. 219.

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It only remains to consider whether the trust is sufficiently made out. It is not denied by complainants' counsel that a trust in slaves may be created by parol; nor could it be with any plausibility. The 7th section of the English statute of frauds embraces only trusts in "lands, tenements, and hereditaments." "Even in England, therefore, a valid trust of personal property may not only still be created, but, if necessary, established by mere parol declarations. Hill on Trustees, 57. And parol trusts in both lands and slaves have often been set up and enforced by this Court. *McLanahan v. McLanahan*, 6 Hum., 99; *Haywood v. Ensley*, 8 Hum., 460; *English v. Tomlinson*, 8 Hum., 378; *Harris v. Carney's Adm'r.*, 10 Hum., 349; *Eaves v. Gillespie*, 1 Swan, 128. What effect the registry laws may have upon such trusts, as against third persons, we need not now stop to inquire. But it is urged that the terms of the trust are insufficient to secure the property to the sole and separate use of Mrs. Saunders. We cannot assent to this. It is clearly shown by one, and perhaps two witnesses, that the sole object of the conveyance was to secure the property to Mrs. Saunders, free from her husband's debts. This would be sufficient to establish the trust, without laying any stress upon the nature of the transaction itself, a conveyance by the beneficiary herself which would be rendered wholly nugatory, unless construed in the way she intended it. The trust was recognized by John H. Bowen and James Saunders, and, as we have seen, by the complainants, after their father's death. There is no pretence for claiming that any title vested in Major Saunders by virtue of the statute of limitations. There was never

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any adverse holding upon which the statute could operate. The usual acts of ownership, which were exercised equally over Molly as over Lydia, are not, under the circumstances, entitled to any weight, as was held by this Court in the analogous case of *Foster v. Jordan*, 2 Swan, 476. It follows, necessarily, that James Saunders having acquired no title to Lydia and her increase, could convey none to the complainants by his will.

This view of the case renders it unnecessary to consider the doctrine of *estoppel* upon the defendants, by reason of the proceedings in the case of *Ward v. Saunders*, as before detailed. It may not be improper to say, however, that while it would be difficult to maintain that the complainants are *estopped* by anything in that case from setting up any rights they might have under their father's will, since no such rights were directly or even incidentally involved in the issues made, it would, perhaps, be equally difficult for the complainants to avoid the effect of their admission that their mother had actually given away some of the descendants of Lydia, so far as that fact could operate upon their rights.

The costs of the entire cause will be divided equally between the complainants and the defendants; and, with this modification, the decree of the Chancellor is affirmed.

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CHARLES J. GOODALL v. LAVINA THURMAN.

1. **MARRIAGE CONTRACT.** *When void or voidable.* A promise of marriage made in consideration of *illicit intercourse* is void, and cannot be enforced. If the plaintiff is delivered of a child after the promise, not begotten by the defendant, or if the defendant supposed that the plaintiff was modest and chaste, and it turned out she was not, he would not be liable for a breach of his promise to marry her.
2. **SAME.** *Evidence. Seduction.* Under the general *issue*, in an action for a breach of a marriage contract, the plaintiff may give in evidence, in aggravation of damages, that she was seduced and got with child by the defendant.
3. **SAME.** *Same. Damages.* In an action for a breach of promise of marriage, the damages to be recovered are in the sound discretion of the jury under the circumstances surrounding the case. They are to look to the rank and condition of the parties, the estate of the defendant, and to all facts proven in the cause, and award damages commensurate with the injury inflicted.
4. **CIRCUIT COURT.** *Charge to the jury.* The instructions of the Court to the jury should be confined to the case made out in the proof, otherwise the jury might be misled by an abstract principle, which, though correct, has no application to the facts proved; but if there is testimony tending to raise the question, it is not the province of the Court to determine whether it is sufficient. The Court should state the law, and leave to the jury the determination of the effect of the evidence.
5. **NEW TRIAL.** *Excessive damages.* In trials at common law, the jury are the proper judges of damages; and where there is no certain measure of damages, the Court will not, ordinarily, disturb their verdict, unless on grounds of *prejudice, passion, or corruption* in the jury.
6. **SAME.** *Relationship of a juror.* A relationship by affinity is dissolved by the death of the party, by a marriage with whom, the relationship was created. Hence, a juror whose wife is dead is competent, although by his marriage he was related to one of the parties to the suit within the prohibited degree.

FROM SUMNER.

Verdict and judgment at the October Term, 1858,

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for \$5,000. Motion for a new trial overruled, TURNER, J., presiding. The defendant appealed.

HEAD & TURNER, and BENNETT, for the plaintiff in error.

J. J. WHITE, for the plaintiff in error, argued:

1. The damages are excessive. It will not do, in our sympathies for the sex, to make no distinction between women, and to place the impure and vicious upon a level with the purest and most exalted. The proof shows, that if the defendant in error was not actually a courtesan, her conduct was such as to invite improper approaches; and that it was so doubtful, both in regard to the contract of marriage and the paternity of the child, it was not a case for exemplary damages.

2. The Court erred in the charge to the jury. He first supposes a case without evidence to support it, which is, in effect, an inflammatory appeal to the jury. But, 2d, according to a high authority, (2 Greenleaf on Ev., sec. 256,) the damages to be recovered must always be the natural and proximate consequence of the act complained of. He says, "it has been held, that in assumpsit for breach of a promise to marry, evidence of seduction is not admissible in aggravation of damages," and quotes several authorities. It is true, in 2 Tennessee Reports, 234, the law is intimated differently; but the authority in Greenleaf would seem to be right upon principle, for this seduction and illicit intercourse does not *naturally flow from a promise to marry*, but it is an independent, vicious act on the part of both.

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The law makes the father responsible for the support of the child; but it does not intend to pay her on that account. To do so would be to encourage licentiousness and reward vice. Hence it is that the mere fact of a female having an illegitimate child affords her no ground for an action. To couple it then with another matter which does, as a breach of promise to marry, cannot change the principle in her favor. 2 Bibb, 341, *Barkes v. Shain*.

We think the Court likewise erred in telling the jury to "inquire not what defendant can pay, but what the plaintiff ought to receive." If the defendant had a large estate, that might be shown to increase the damages. If he is worth nothing, would not that diminish them?

The importance and novelty of the case are reasons for granting a new trial, as said by the Court in the case of *Abbott v. Seaber*, 3 Johns. Cases, 89. Suits of this kind have been rarely brought in this State, and, therefore, the law has not been well considered here in regard to them.

GUILD, for the defendant in error.

BAXTER SMITH, for the defendant in error, said:

It is insisted by the plaintiff in error, that a new trial should have been granted him upon the ground that *James Gwin*, a member of the jury, was connected by affinity to the defendant in error, within the degree

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that would render him incompetent as a juror, computing according to the rule of the civil law. This might have been urged as an objection to the juror's competency when he was first called; but as no such objection was *then* made, and the question of his relationship was not put to him, it is too late to rely upon this ground for a new trial after the verdict has been rendered. It is submitted, that a presumption legitimately arises, as nothing was said about it when the jury was made up, that the objection to the competency of this juror was waived, if any existed, or that the parties consented that the juror might act. The act of Assembly declaring persons related within the sixth degree, by affinity or consanguinity, incompetent to act as jurors in any case, provides that the parties to the suit may waive any objection to such incompetency. Code, sec. 4003. If any such connexion ever existed between the defendant in error and this juror, as to render the latter incompetent to set as a juror in the case of the former; we contend that such connexion had been broken by the death of the juror's wife, and his subsequent marriage. The reason of the rule in such case ceases *then* to exist, for in a majority of cases, as the experience of the world goes, a party's feelings are more likely to be adverse than too partial to his or her connexions by a former marriage. This objection is certainly a "nice and formal one, which does not go to the real merits of the case," and for such, a new trial will not be granted. Bl. Com. B., 8 marg., page, 392.

2. There is no error in the charge of the Court. n an action for a breach of a promise of marriage,

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evidence may be given of the defendant's impregnating the woman, in aggravation of damages. 2 Tenn. R., 233.

3. This being a civil action for damages, the Court will not disturb the verdict of the jury on the ground of excessive damages, unless they are "flagrantly outrageous and extravagant, evincing intemperance, passion, partiality or corruption, such as all mankind would at once pronounce unreasonable." *Boyers v. Pratt*, 1 Hum., 93. It will scarcely be contended that the damages in this case evince any such conduct or feelings upon the part of the jury.

The damages are within the sound discretion of the jury, under the circumstances of each particular case. *Southard v. Rexford*, 6 Cowan, 254.

Can it be, that the poor are not as chaste as the rich?

CARUTHERS, J., delivered the opinion of the Court.

This action was for breach of a contract to marry, and the recovery was for \$5,000 damages.

It is insisted that the damages are excessive, and so we think; but whether to that extent which would, under the rules on that subject, authorize us to reverse on that ground alone, is a different question. There are some cases in which the engagement to marry is used for the basest purposes, by unprincipled men, and in these, the damages cannot well be too heavy. In this case, proof was admitted tending to show that the defendant succeeded in the seduction of the plaintiff by the

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confidence inspired in that way. She was certainly delivered of an illegitimate child, which she charges upon him, and insists that she was induced to surrender her virtue in consequence of his reiterated assurances, that he would comply with his contract to marry her. This is the position assumed in the argument upon the circumstances proved.

But a question of law is here made, as to the admissibility of evidence of seduction in a suit for breach of a contract to marry. The Court below admitted it, in aggravation of damages. To show this was error, we are referred to a passage in 2 Greenleaf on Ev., sec. 256, where, in illustration of the rule, that the damages to be given must be the natural and proximate consequence of the act complained of, he says, "it has been held that, in assumpsit for breach of a promise to marry, evidence of seduction is not admissible in aggravation of damages," with a reference to cases.

The contrary was settled in *Conn v. Wilson*, 2 Tenn. R., 234, as early as 1814. The Court say, "the cases referred to in 3 Mass. R., 71 and 189 demonstrate, that it was proper to receive this evidence in aggravation of damages. * * * Morality requires it in order to repress the libidinous advances of the male sex, under dishonest and seductive assurances of marriage." We are not aware that this decision has ever been departed from, in practice, by our Courts. Whatever the opinions of elementary writers, or the Courts of other States may be, that is our law, and we are not disposed to change it. A promise to marry is not unfrequently one of the base and wicked tricks of the wily seducer to accomplish his purposes, by overcom-

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ing that resistance which female virtue makes to his unholy designs. Whenever seduction follows an engagement to marry, it may well be asserted that the promise, on the part of the man, was intended to cover his designs upon her virtue, by winning her affections and confidence. The fact that the hypocritical suitor is prepared to destroy her character, shows, conclusively, that it was not his intention to make her his wife. His success in the destruction of his victim, is, generally, the result or consequence of his engagement to marry. This injury, then, is sufficiently proximate to be taken into the account in estimating the damages in a suit of this description.

We fully concur with his honor, in that part of his charge to which objection is made, to the effect, that if the jury "believed from the testimony in the cause, that the defendant entered into a marriage contract with the plaintiff, and that he resorted to the contract as a means of debauching and seducing her, and for the purpose of gratifying his lustful and brutal passions, then the jury should give to the plaintiff exemplary and substantial damages."

Where no other injury follows a breach of this contract but disappointed hopes and the mortification of rejected love, the measure of damages would be different, because honor and chastity are still left, and the injury may be repaired. But when all is lost, happiness, honor, character, a case is certainly made for "exemplary and substantial damages." That the parent has an action for damages in this last case, can make no difference as to the amount of compensation to which the sufferer is entitled.

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It is objected, that there was no proof in the cause to which this strong proposition in the charge could apply. If so, it was improper, as the charge should be confined to the case made out in the proof, and the jury might, as argued, be misled by an abstract principle, though correct, which had no application to the facts in proof. But if there was testimony tending to raise the question, and this cannot be disputed, it was not for the Court to determine whether it was sufficient or not; it was proper to leave that to the jury, and declare the effect in law if established to their satisfaction. He did nothing more.

It is contended, that as the defendant was poor, it was erroneous in the Court to charge, as he did, that the jury could not look in the assessment of damages, to his ability to pay. The charge on this point, was, "that the damages to be recovered are in the sound discretion of the jury, under the circumstances surrounding the case. The jury, in assessing damages, are to inquire, not what the defendant can pay, but what the plaintiff ought to recover. They may look to the rank and condition of the defendant." A man's poverty certainly should not secure him from damages commensurate with the injury inflicted. It is enough that they cannot be collected when recovered. The charge would, perhaps, have been more full and accurate to have made some reference to the estate of defendant, as a matter to be looked to in the discretion of the jury, but error cannot be predicated of this omission.

There is proof in this record very seriously impeaching the character of the plaintiff, for want of prudence and proper female modesty in her intercourse with men;

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and so is her sister Martha, the main witness in proving the contract as well as the seduction, convicted of many contradictions and inconsistencies; but on the other hand, they are well sustained in their character and reputation by many reputable witnesses. All these matters have been passed upon by the jury, and they have in their verdict fully vindicated them, and it is not for us to say that their conclusions were wrong.

But amidst the doubts and difficulties in the proof as to the contract itself, and the paternity of the child, we think the verdict was a very strong one. It is right, in this kind of cases, to lay a heavy hand upon the foul and deliberate betrayer of a worthy woman's confidence; but there may be danger of going so far as to hold out a temptation to an unprincipled woman to seek her fortune by the too easy surrender of her honor, or to avenge imagined wrongs. The best interests of society, and public policy, as well as the cause of morality, may be put in jeopardy by either extreme. Though it is generally true, yet not always so, that the fault is entirely on the side of the man in these unfortunate occurrences. There may be danger, unless a wise discrimination is observed by juries and Courts, between the cases, in reference to the character of the parties and the attending circumstances, of holding out a bribe in these large verdicts, to the wicked and unprincipled to entrap unwary youth, and tempt the incautious and unsuspecting.

After all, we do not feel authorized to grant a new trial in this case upon the single ground of excessive damages, although we consider the amount entirely disproportionate to the case made out in the proof. The law on this subject is correctly laid down in 2 Greenleaf,

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sec. 255: "In trials at common law, the jury are the proper judges of damages; and where there is no certain measure of damages, the Court, ordinarily, will not disturb their verdict, unless on grounds of *prejudice, passion, or corruption* in the jury." To this rule we have conformed our practice, and it is the only safe one on the subject.

The Court, in his charge, gave the defendant the advantage of every principle of law applicable to the facts proved, that could absolve him from the obligation of his contract. He told them that if the promise was made in consideration of illicit intercourse; if the plaintiff was delivered of a child, after the promise, of which he was not the father; if he supposed her to be modest and chaste, and it turned out she was not, he would not be liable for a breach of his contract to marry her.

It is enough to say, in reference to the affidavits offered on the motion for a new trial, that there is nothing in them to authorize it. The principle point is, that it is made to appear by the affidavit of one of the jurymen, that he was related within the prohibited degree, by affinity, to the plaintiff. But his wife was long before dead, and that dissolved the relationship, and removed the disability. Independent of this, it was perhaps too late then to make the question.

We are constrained to affirm the judgment.

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JAMES C. SANDERS v. YOUNG AND McFERRIN.

1. **PLEADING.** *Pleas struck out. Defence under informal plea.* Immaterial pleas may be struck out by order of the Court. But if a plea be improperly struck out, and a party is permitted, under a less appropriate plea, to avail himself, fully, of all the matters of defence upon which he relies, the rejection of the plea does not constitute error affecting the merits, for which the judgment will be reversed.
2. **FERRY AND FERRYMAN.** *Liability of ferryman. Common carrier.* A ferryman is liable as a common carrier. The keeper of a public ferry is bound to have a boat, safe and sufficient, for all the purposes incident to his employment. He is likewise bound, at all times, to have a skilful ferryman, and a sufficient force to manage the boat; and to take proper care of persons, and all kind of property received for transportation. And for all loss or injury occasioned by neglect of these duties and precautions, he is liable.

FROM SMITH.

Tried at the March Term, 1858. Verdict and judgment for the plaintiffs, GOODALL, J., presiding. The defendant appealed.

J. B. MOORES, for the plaintiff in error.

S. M. FITE, for the defendants in error.

McKINNEY, J., delivered the opinion of the Court.

This action was brought against the plaintiff in error, as keeper of a public ferry on the Cumberland river, for the value of a mule lost by drowning in crossing

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at said ferry. Verdict and judgment were rendered in favor of the plaintiffs for \$170 damages. We think there is no material error in the record.

1. The several pleas of the defendant, which were struck out by order of the Court, were all immaterial, except the first, or, at most, amounted only to the general issue. The first plea of the general issue, not guilty, though not altogether unexceptionable in point of form, was, perhaps, good in substance, and not inappropriate to the true *gravamen* of the action, as laid in the declaration. But though this plea was improperly struck out, the plaintiff in error cannot, under the circumstances, ask a reversal of the judgment for that cause; inasmuch, as under a less formal and less appropriate plea—a sort of plea of non-assumpsit—he was permitted to bring out and avail himself fully of all the various matters of defence upon which he saw fit to rely. The irregularity complained of, therefore, however subject to criticism, does not constitute error affecting the merits of the cause for which the judgment ought to be reversed.

2. There is no error to the prejudice of the plaintiff in the instructions of the Court. A ferryman is liable as a common carrier. 2 Kent's Com., 598; Story on Bailments, 506, 507. It avails the plaintiff nothing, in this action, that, by an order of the County Court, pursuant to the act of 1842, ch. 134, sec. 3, he was excused from having "hand-rails" fixed upon his ferry-boat, for the greater security of "stock." This exemption from the general requirement of the statute does not diminish, or in any way affect his duties or liabilities as a ferry-keeper upon the general principles of the common law.

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Irrespective of the statute of 1842, the keeper of a public ferry is bound to have a boat, safe and sufficient, for all the uses and purposes incident to his employment. He is likewise bound at all times to have a skilful ferryman, and a sufficient force to manage the boat, and to take proper care of persons and all kind of property received for transportation; and for all loss or injury occasioned by neglect of these duties and precautions, he is liable.

Applying these principles to the facts of the present case, the judgment is clearly correct.

Judgment affirmed.

J. J. SUGG v. A. J. POWELL *et al.*

1. **ASSIGNMENT.** *Negotiable paper. Notice to payor not necessary.* The assignment of negotiable paper to a third person, as collateral security for a pre-existing liability, is valid, and the equity of the assignee is superior to that of a subsequent attaching creditor. Notice of the assignment, to the payor of the note, is not necessary to perfect the right of the assignee.
2. **EVIDENCE.** *Acts and declarations of the assignor.* The acts and declarations of the assignor of a note, anterior to the filing of the bill, are competent evidence in a contest between an attaching creditor and the assignee.

FROM RUTHERFORD.

The complainant, Sugg, filed his original bill attaching the judgment mentioned in the opinion. The de-

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fendant, John Powell, filed a cross-bill, claiming that he held the note upon which said judgment was founded, as collateral security to indemnify him as surety on a note of A. J. Powell to one T. B. Marks. Chancellor RIDLEY decreed for John Powell. Sugg appealed.

E. A. KEEBLE, for the complainant.

E. COOPER and AVENT, for John Powell.

WRIGHT, J., delivered the opinion of the Court.

The complainant, Sugg, is an attaching creditor of the defendant A. J. Powell.

The object of his bill is to subject to his debt a judgment in favor of said Powell, against B. D. Holt, for \$414.14, rendered the 19th of May, 1856, before David Stephens, a justice of the peace.

The complainant's bill was filed the 19th of June, 1856.

It appears that T. B. Marks held a note upon A. J. Powell, in which his father, John Powell, and one Clanton were his securities for \$380, which, between the first and fifteenth of May, 1856, was placed in judgment against John Powell, one of the sureties, before S. G. Miller, a justice of the peace.

It is contended by John Powell that the *promissory note* upon which the judgment against Holt was taken, was, prior to the rendition of said judgment, transferred and delivered to him by A. J. Powell, as indemnity against the debt on which he was surety to Marks; and that he was to collect said note, and apply so

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much of its proceeds as might be necessary, in payment of the debt to Marks, and in his own discharge as surety;'

He insists, therefore, that he is entitled to priority over the complainant Sugg, so far as may be necessary for his indemnity.

The Chancellor so held, and we concur in the decree.

It is admitted in the record that John Powell has paid the debt to Marks. And it is proved to our satisfaction that *the note* upon Holt, before it was put in suit, or reduced to *judgment*, was transferred and delivered by A. J. Powell to John Powell, expressly for his indemnity.

This took place more than a month previous to the issuance or service of the attachment in favor of Sugg.

We are satisfied of this fact upon proof independent of anything stated by Mitchell Powell.

Marks proves that A. J. Powell told him he had left the claim on Holt in the hands of John Powell, to pay the debt to him; and he, in effect, establishes, that when he afterwards saw John Powell, he had possession of the note, and offered to let him have it in payment of the debt due him.

Davis, the constable, who had the note for collection, proves, that when he received it of Mitchell Powell, he told him it was to go to pay the debt to Marks.

Parker, in April, 1856, heard a conversation between Sugg and A. J. Powell, which, we take it, referred to the note on Holt; and the effect of which, by Powell, was that John Powell had and claimed the note to secure him against the Marks' debt.

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Clanton proves that A. J. Powell told him he had given his father the note on Holt to pay the debt to Marks.

Mitchell Powell proves the same thing, and that he received the note of his father, as his agent, to carry to Davis, the constable, for collection; that he placed the note in the hands of Davis for that purpose—took his receipt and handed it to John Powell; and that he stated to Davis the use to which the note was to be applied, and that it belonged to John Powell for the purpose of paying the debt to Marks.

It is true Davis does not remember that he mentioned the claim of John Powell upon the note, but still we cannot doubt the fact that the note was placed in his hands for his indemnity. All this took place previous to the filing of Sugg's bill; and the position that A. J. Powell's acts and declarations, anterior to that time, are not evidence of John Powell's title, is untenable. 1 Greenl. Ev., sections 180, 189, 190.

The transfer of *the note* to John Powell being established, it follows that his equity is superior to that of Sugg. *Nolen v. Crook et al.*, 5 Hum., 812.

It is said Holt, the debtor in the note, should have had notice of its transfer to John Powell; and that, until this was given, his title was not complete, and the debt might be attached by Sugg as the effects of A. J. Powell. And to sustain this position we are referred to *Clodfelter v. Cox*, 1 Sneed, 330. But the doctrine of that case has no application to negotiable paper, as was held by this Court in the *Mutual Protection Insurance Company v. Hamilton et al.* 5 Sneed, 269.

We affirm the decree

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W. R. ELLISTON *et al.* v. J. M. HUGHES *et al.*

CHANCERY. *Discovery. Evidence.* If parties reduce the terms of their contract to writing, and it is left with one of them to copy for the purpose of being executed, which, through inadvertence is omitted to be done, and a suit at law is brought by one of the parties to said contract, the other party is entitled to a discovery by bill in Chancery, as to the identity of the paper thus prepared, and as to whether it contains the terms of the contract as agreed upon, to be used as evidence in the trial at law.

FROM DAVIDSON.

This cause was heard upon demurrer, before FRIERSON, Chancellor, at the December Term, 1858. The demurrer was disallowed, and the defendants appealed under section 3157 of the Code.

COOPER and HOUSTON, for the complainants.

TRIMBLE and DEMOSS, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

There was a demurrer to the bill, which, on argument, was disallowed, and the defendants appealed under sec. 3157 of the Code.

And the only question necessary to be determined is, whether, upon the facts charged in the bill, the complainants are entitled to a discovery from the defendants, in regard to the unexecuted writing exhibited with the

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bill, alleged to contain the terms of the contract between the parties.

The substance of the bill, so far as is necessary to be noticed, is, that in October, 1856, the complainants determined to erect a building in Nashville, for a wholesale dry-goods house, and contracted with the defendants to do the carpenters' and joiners' work of said house; that the terms and conditions of the contract were agreed upon, and reduced to writing; and that said writing, which is made an exhibit, contains the true and entire contract as agreed upon by the parties; and that all its terms were fully assented to by the defendants. That said writing was not signed by the parties at the time, for the reason that there were interlineations and blots upon its face. And it was mutually agreed between the parties, that the complainant, Elliston, should take the paper and make two copies of it to be executed by them, one for each of the contracting parties. But that complainant laid the paper away in a safe, and inadvertently omitted to copy it. The bill alleges, however, that notwithstanding this neglect, the work was undertaken and performed under said contract, and not otherwise. It is further stated, that the defendants have brought suit for said work; and in the bill made out by them, they claim some \$1800.00 more, for flooring, than by the terms of the written contract they are entitled to demand. It is alleged that there was no witness to the contract, as agreed on and set forth in said writing.

The bill prays for a discovery under oath, and also to have said written contract set up and executed specifically; or, that the parties be required to execute it, so

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that it may be used on the trial at law, and for general relief.

The bill does not, in our opinion, make a case for anything more than a discovery, and to that extent we think it ought to have been entertained. All that can be necessary or important to the complainants, in their defence at law, is to establish that the writing contains the true and entire terms of the contract, as mutually understood and agreed upon by the parties, as charged in the bill. It is true, that under the statute, this discovery might have been had in the Court of Law in which the suit is pending. But this does not affect the jurisdiction of a Court of Equity. And, for obvious reasons, it may have been thought preferable to resort to the latter tribunal.

If the terms of the entire contract were reduced to writing, as understood and assented to by the parties, the paper itself is certainly the most satisfactory and reliable evidence, even if it were in the power of the complainants to adduce parol evidence of its contents. This much may be said, without intending to be understood as intimating that it is a *higher* grade of evidence in the legal sense of that term.

Regarded as a matter of evidence merely, the non-execution of the paper is of no consequence. The inquiry is, whether, as a matter of fact, the paper contains the evidence of the true agreement. The execution of the paper would have furnished, at least, *prima facie* evidence of that fact; and its non-execution forces the complainants to resort to other evidence of its authenticity. But still the inquiry is the same. If this view be correct, the paper, if admitted by the defendants, would be as available for the complainants on the trial at law,

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in the state in which it is, as if it were executed. And they are as much entitled to the discovery sought, as they would be to demand its production, if in the possession of defendants and wrongfully withheld by them.

The objection, that it is not distinctly alleged in the bill that the complainants cannot otherwise prove the terms of the agreement, we think is not tenable. As already intimated, we think the complainants are entitled to the discovery asked for, without reference to the inquiry, whether or not they have it in their power to prove the agreement by parol evidence. But, if this were not so, the averment "that there was no witness to said contract at the time it was made and agreed upon," ought, upon demurrer to the bill, to be taken as a sufficient answer to the objection.

We do not mean to disturb the decision in the case of *Whitesides v. Lafferty*, 9 Hum., 27, though it carries the doctrine quite as far as we feel inclined to go.

As regards the neglect of the complainants to have the contract prepared and executed, as agreed upon; whether it was purely the result of inadvertence as alleged, or of an intention on their part to abandon the contract, will be a matter open for the consideration of the jury.

Decree affirmed.

James L. Bell v. Plummer Williams, Adm'r of Harris.

JAMES L. BELL v. PLUMMER WILLIAMS, ADM'R OF HARRIS.

CHANCERY JURISDICTION. *Judgment. Service of process.* If a judgment is rendered against a party without service of process upon him, and by reason thereof he does not appear, or make defence to the action, a Court of Chancery will enjoin such judgment; and it is not necessary to relief in such a case, to show that a valid defence could have been made by the party if he had been summoned.

FROM DICKSON.

Chancellor PAVATT decreed for the defendant. The complainant appealed.

FINDLEY, for the complainant.

W. LOWE, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

This is a bill filed by the complainant to enjoin a judgment at law recovered against him by Edwin Harris, the intestate of the defendant. The ground of equity set up in the bill is, that complainant was never served with process in the trial at law; had no notice of it, and never appeared or made any defence to the action.

The Chancellor refused the complainant relief, and dismissed his bill.

In this we think he erred. We are satisfied from the proof in this record, that no process was executed upon the complainant in the action at law, and that he

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did not appear or make defence to it; and in fact had no notice of the judgment until long after its rendition.

This being so, upon the authority of the case of *Ridgeway v. The Bank of Tennessee*, 11 Hum., 523, he was entitled to relief; and it was not material in such a case, to inquire whether the complainant could have made a valid defence if he had been summoned.

It has been repeatedly held by this Court, that in such a case the injury consists in the rendition of a judgment against a party, without notice and the opportunity of defence; and that it is unjust and unconscientious to attempt to enforce a judgment so obtained.

We reverse the Chancellor's decree, and decree for the complainant.

BENJAMIN BARNES v. ANDREW GREGORY.

1. **CHANCERY. Deeds. Reformed for fraud or mistake.** It is a general principle, alike applicable at law and in equity, that a deed must be held to contain the true and full contract of the parties, and parol proof cannot be heard to change or reform it; but this general rule does not apply to cases of fraud or mistake in the execution of the deed. A Court of Chancery has power to reform and correct errors in deeds, produced by fraud or mistake.
2. **SAME. Same. Sale in gross and by the acre.** A sale of land in gross, in the absence of fraud, is binding upon the parties as to quantity; but if the sale is by the acre, and it turns out that there is a mistake

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as to the number of acres settled for, either party may have the mistake corrected, and an abatement or increase of the price, for the deficiency or overplus in the quantity sold.

FROM DAVIDSON.

Decree for the complainant, before FRIERSON, Chancellor, at the November Term, 1858. The defendant appealed. The facts are stated by the Court.

EWING and COOPER, for the complainant, said :

1. This case would present no difficulty even on the bill and answer alone. The answer admits enough to convict the defendant of improper haste, if not actual fraud, in procuring the deed, and states circumstances utterly inconsistent with the defendant's assertion that the sale was in gross. There is no reason why the trade could not have been closed when the \$100 was paid, and the \$400 note given, if the survey was not necessary for the purpose of fixing the amount of the purchase money, for which the last note was to be given. The defendant's going away with the surveyor, his admission that he knew there were more than thirty acres in the tract, his coming with the deed already prepared, and hot haste in getting it executed, stamps the transaction, when taken in connection with the feeble, helpless condition of the person he was trading with, as one which the defendant should never have allowed to be spread upon the records of the country against him.

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2. But then the proof is all one way. Every witness who speaks of the trade at all, proves that the complainant said and thought he was giving \$35 an acre, and that the defendant admitted that he was to give that price per acre. It would be monstrous to allow the defendant, under these circumstances, to take advantage of the deed written by himself, and procured in the manner detailed by all the witnesses, and admitted by himself. The land really contains fifteen acres more than what the defendant has paid for, being an excess equal to one-half of the tract as claimed by the defendant. There is not a particle of proof in the record to sustain the defendant in his assertion that the trade was in gross.

3. The defendant, however, relies upon the written deed, and insists that the instrument cannot be altered by parol proof, nor the relief granted without such alteration. It might be sufficient to say to this, in the language of the Chancellor in delivering his opinion, that the deed is not necessarily altered at all. It describes the land, after giving the boundaries correctly, as containing thirty acres, more or less; and all that it is necessary for the Court to do is, to make the defendant pay for what he got. But, in addition, it would be an insult to the legal knowledge of the Court to say more than that "it is well settled that parol evidence is admissible on the part of either complainant or defendant to reform a deed or contract on the ground of fraud or mistake, and to carry it into execution as reformed." 2 White and Tudor's Lead. Cases, part 1, p. 570, and cases cited; 11 Hum., 415; 8 Hum., 230; 1 Hum. 481.

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BRADFORD and McDONALD, for the defendant.

The deed to the land is the best evidence of the contract of sale, and is supposed to contain all that was agreed upon by the parties. 1 Story's Eq. §§ 153-160. It is the most solemn instrument known to the law, and every intendment of the law is in favor of its containing the whole of the agreement of the parties. And a Court of Equity cannot and will not hear parol proof of anything in regard to the contract or agreement not contained in the deed, except upon full and satisfactory proof of fraud, accident, or mistake. 1 Story, secs. 151 to 164.

The complainant was put upon the *inquiry by the survey, and had the means at hand, by the presence of the man who made the survey, to ascertain the precise quantity*. He did not avail himself of the opportunity, and the Court will not now do for him that which, through his gross negligence and inattention to his own interest, he did not do for himself. *Trigg v. Read*, 5 Hum., 529; Story's Eq., §§ from 146 to 151, and notes to 146.

The Court will see that this is an application by a *vendor* against his *vendee* for relief, for an excess in the quantity of land conveyed. All the cases we have been able to find reported are of *vendees* against *vendors*. And we apprehend that the rules of granting relief in these cases would be interpreted more strongly against a *vendor* than a *vendee*. Indeed, we do not see how the Court could grant relief in such a case to a vendor unless he had reposed a *trust* in the *vendee*; and that is not this case. Here there was no obligation or

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trust on the part of the vendee any more than there was on the part of a stranger to the transaction. 1 Story, §§ 204 to 208; also, 147, 148, and 149.

CARUTHERS, J., delivered the opinion of the Court.

The complainant sold to the defendant a small tract of land on Stone's river, in Davidson county. The deed gives a description of the land, and states that it contains "*thirty* acres more or less," and the consideration \$1,050.

This bill is filed to correct a mistake as to the quantity of land, to the extent of fifteen acres, and claiming \$35 per acre for the same. It is charged that the sale was by the acre, and the quantity to be ascertained by a survey; that before the execution of the deed the survey was made by one Hamilton, and the quantity ascertained and concealed from him, and his deed obtained, and notes executed for the thirty acres, instead of the true quantity of forty-five acres.

The defendant denies that the sale was by the acre, but insists that it was in gross; that he was to give \$1,050 for the tract; that he was, by the contract, to have it as containing thirty acres, whether it were more or less than that quantity. He relies upon his deed as written evidence of the contract which cannot be changed by parol.

The proof leaves no doubt upon the mind as to the contract having been a sale by the acre, and not in gross. It is clearly established that it was so under-

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stood by both parties, both by their actions and declarations, though the defendant sometimes denied it. The fact that a survey was to be made before the execution of the last note for the consideration, and the deed, is almost conclusive of that fact. It is entirely so when combined with the declarations of both parties at, before, and after that time.

The testimony also raises a strong presumption that the defendant knew of the excess before the writings were drawn and signed, and concealed it from complainant. The facts are, that the survey was made by Hamilton on the day agreed upon; but the calculation was not made on that day, but was to be made out that night, and on the next day the parties were to meet again at the house of complainant, and execute the writing—the contract still resting in parol. The surveyor and the defendant went and staid together at the house of a neighbor, and returned next day about dinner-time, with the deed and notes prepared. The defendant read over the deed, and being in a great hurry, procured it to be signed by complainant, delivered his notes, and went off. At the time of signing the deed, complainant inquired whether the survey made out more or less than thirty acres; and referred to the contract, that whether more or less, the price agreed upon was \$35 per acre. The defendant asserted that he did not know how much there was, but he was to pay \$1,050 for the tract, or \$35 per acre for thirty acres, without regard to the actual number. So, after a short conversation, he went off in haste, having, as he said, urgent business of an official character to attend to at home, carrying the deed with him. It is impossible for the mind to doubt, from

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these facts, that he and Hamilton had made a calculation upon the field-notes that night, at least, so far as to be convinced that the tract exceeded thirty acres, and that this fact was purposely concealed from the complainant. It appears that the complainant was weak and sickly, and about sixty years of age. It may be that Gregory said what was literally true, when he asserted that *he* had not made an accurate calculation of the quantity, and that he did not know the *exact* quantity. But that he did know there were more than thirty acres there can be no question. He should have stated this fact to complainant, and not suppressed it when inquired of on that point; and more especially as he was with the surveyor, who was acting for both parties.

But still it is contended that the deed must be taken as containing the true and full contract, and that no parol testimony can be heard to change or reform it.

That such is the general rule, both at law and in equity, no one will be heard to question. But it is just as unquestionable that this may be done where clear proof is made of fraud or mistake. Both positions are too familiar to permit a reference to authorities.

The power of a Court of Equity to reform deeds in cases of fraud or mistake, was exercised by this Court in *Williams v. Conrad*, 11 Hum., 415; 8 Hum., 230; and 1 Hum., 433. The authorities are all collected in White and Tudor's Lead. Ca., vol. 2, part 1, 558 to 596.

But in this case, perhaps, it is unnecessary to resort to the doctrine of *reforming* deeds, by the proof of mistake or fraud. The deed, perhaps, gives the boundaries correctly according to the survey, and needs no change;

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but the statement of the quantity of land contained in those limits is inaccurate, and so is the amount of the consideration. That the consideration stated in a deed is only *prima facie*, and may be controverted by parol, has been often held. This deed is silent as to the disputed question, whether the sale was by the acre or in gross. To establish the former, and obtain pay for the whole quantity sold, is the object of the bill. This fact may be made out by parol or extrinsic written evidence. At the last term at Knoxville, in the case of *Bently v. Miller and Wife*, not yet reported, we gave relief to the purchaser, Bentley, upon the ground that the sale was by the acre, as proved by extrinsic evidence, where the deed was like the present, because of a deficiency of acres. Such is the uniform course of decision where there is a substantial deficiency, and the contract by the acre; or, even in gross, wheret here is fraud or imposition. Not so, where the contract is fair, and the sale is by the tract upon the judgment of the parties.

The same rule must apply, under the same circumstances, in favor of the vendor where there is an excess, for which, by mistake or fraud, he has received no compensation, or has been deprived of the benefit of his contract of sale by the acre. *Horn v. Denton*, 2 Sneed, 125.

The complainant, then, is entitled to relief upon the ground of his actual contract, the mistake in the settlement carried into the writings executed, and for the fraud of the defendant.

The decree of the Chancellor will be affirmed with costs, and the cause remanded for further proceedings upon his decree, which is in all things correct.

Samuel M. Allen *et al.* v. Mary Barksdale *et al.*

SAMUEL M. ALLEN *et al.* v. MARY BARKSDALE *et al.*

1. CHANCERY PRACTICE. *Bill of review. Power of Court over its decrees.* A decree which is a final adjudication upon the rights of the parties, passes beyond the control of the Court after the term at which it was pronounced, and cannot be changed or altered, except upon a bill of review filed within proper time.
2. SAME. *Same. Same. Case in judgment.* A final decree was made in 1852, settling the rights of the parties to certain slaves. After the lapse of more than three years, this bill was filed, alleging that said suit was prosecuted upon a champertous agreement, but the complainants were ignorant of it until a short time before filing of the bill. Held; the Court had no power to alter or change the original decree passed in 1852; that this is not a bill of review, and if it was, it is not filed within proper time.

FROM DAVIDSON.

The bill was dismissed upon demurrer by FRIERSON, Chancellor, at the November Term, 1858. The complainants appealed.

J. S. BRIEN, for the complainants, said:

On the fact of champerty appearing in either of the modes pointed out in the law, the suit must be dismissed. *Weedon v. Wallace*, Meigs R., 286 to 296; *Vincent v. Ashley*, 5 Hum., 593; *Webb v. Armstrong*, 5 Hum., 379.

Are these suits still pending? If so, then there is no further questions which need be noticed.

But suppose them to have been finally determined. Yet

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we insist that the act of the parties was an open violation of the law of the land; was a fraud upon the rights of the complainants; and as these facts were unknown to complainants, being in the breast of defendants alone, until a short time before the filing of this bill. They have now the right to be heard in this complaint. *Belcher v. Belcher*, 10 Yer., 121 to 182; Story's Equity, 187; *Floyd v. Goodwin*, 8 Yer., 484.

This case put in issue the title of property acquired by a champetous agreement. The Judge charged the jury on this point, and the Supreme Court say it is correct. See the principles of this case, and the authorities cited.

The doctrine is well understood, that a contract procured in violation of a public law, is void at the instance of the party injured. *Brien v. Williamson*, 6 Howard, Miss. R.

VENABLE and TRIMBLE, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

This bill cannot be sustained, and the Chancellor acted very properly in dismissing it upon demurrer.

It appears that Wm. Scruggs and Mary Barksdale, in the year 1852, by various decrees in the Chancery Court at Nashville, in several different suits against the complainants, succeeded in establishing their title to a large number of slaves.

These decrees were appealed from and affirmed in the

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Supreme Court of the State, and the causes remanded, to the end, the decrees might be executed.

The slaves were claimed under the will of James Scruggs, who had bequeathed them to Finch Scruggs for life, with remainder to Wm. Scruggs and Mary Barksdale; and the effect of the decrees was to establish their title to the slaves; and that complainants, who were defendants in these suits, should give bond and security to have them forthcoming for delivery, to said Wm. Scruggs and Mary Barksdale at the death of Finch Scruggs, the tenant for life.

The defendants in said suits unite as complainants in this bill, and file it more than five years after the rendition of said decrees, for the purpose of impeaching and setting the same aside.

The ground upon which this is asked to be done is, that the said Wm. Scruggs and Mary Barksdale, prior to the institution of the suits by which they obtained said decrees, had entered into a champertous agreement with Phineas T. Scruggs, to divide the slaves with him when recovered; and that under this agreement the said decrees were had in the names of said Wm. Scruggs and Mary Barksdale. The complainants allege they would have made the defence of champerty to said suits, but were ignorant of it until within a short time of filing this bill.

In other words, the ground assumed is, that they *had a defence* to the suits of Wm. Scruggs and Mary Barksdale, but did not know it, and now ask that these decrees be set aside to enable them to make it. This cannot be permitted.

These decrees were final adjudications upon the rights

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of the parties, and after the adjournment of the Terms at which they were pronounced, passed beyond the control of the Chancery Court, and cannot be altered or changed. *Overton v. Bigelow*, 10 Yer., 48-52-53; 1 Johns. Ch. R., 543.

It is not pretended that this is a bill of review. And if it was, it is out of place and comes too late.

Decree affirmed.

JESSEE ARLEDGE v. G. W. WHITE *et al.*

1. **ATTACHMENT.** *Prior equity. Fund in the hands of a creditor.* A person having a debt against another, and being in debt to him a larger amount, cannot collect the amount due him until the debt due his creditor is paid. A creditor of such person occupies no higher ground, and cannot, by attachment, subject the debt due from such person to the satisfaction of his claim, until the debt due the former is paid.
2. **SAME.** *First attachment holds.* If a person attaches a fund in his hands belonging to his debtor, his attachment will have priority over a subsequent attaching creditor.

FROM FRANKLIN.

RIDLEY, Chancellor, pronounced a decree for the defendant, Frizzell, at the November Term, 1858. The complainant appealed.

METCALF, for the complainant.

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COLYAR and TURNEY, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

In this cause, we think the Chancellor's decree is proper upon two grounds.

First. The defendant, George W. White, at the time complainant filed his bill and had his attachment served, was indebted to the defendant, John Frizzell, in a greater amount than he owed White; and complainant, as an attaching creditor of White, upon general principles, cannot take the fund belonging to him, from the hands of Frizzell, until the debt due the latter is paid.

White himself cannot do so, and complainant is upon no higher ground. This view of the case is sustained by the principles decided in *Nolen v. Crook et al.*, 5 Hum., 312, and *Fay v. Reager, Ex'r, et al.*, 2 Sneed, 200.

Second. Frizzell had attached the fund belonging to White, in his own hands, to secure the debt due him, before complainant filed his bill. This gave him priority.

The objections made here to the attachment, by complainant's counsel, are not of a character to make it void. They, at most, make the proceeding erroneous and subject to abatement upon the plea of the defendant, White, and might be amended. Code of Tennessee, sections 3475, 3476 and 3477; 2 Swan, 107; *Porter v. Partee*, 7 Hum., 168.

We affirm the decree.

W. T. Dortch *et al.* v. R. H. Frasier, for the use, &c.

W. T. DORTCH *et al.* v. R. H. FRASIER FOR THE USE, &c.

BILLS AND NOTES. *Transfer by delivery.* When disposed of by the assignee. If one person accept a bill of exchange for the accommodation of another, and before its maturity such person delivers to the acceptor notes in the place of money, with an unlimited discretion to make such disposition of them as might be thought proper to enable him to meet the payment of the bill soon falling due; and upon the maturity of the bill, the acceptor, not having made any disposition of the notes, pays the same; he can make a valid disposition of said notes to reimburse himself the amount paid out of his own funds.

FROM MONTGOMERY.

Verdict and judgment for the plaintiff, DAVIDSON, J., presiding. The defendants appealed. The facts are stated in the opinion of the Court.

BAILY and HOUSE, for the plaintiffs in error.

HARREL, for the defendant in error, said:

No question is better settled in this State, than that a party, for whose accommodation paper is indorsed without any restriction as to the use to be made of it, may transfer it in payment of a pre-existing debt, or as collateral security for the loan of money or credit. *Kimbro v. Lytle*, 10 Yer., 417, and authorities there cited.

In this case the note was indorsed for the accommodation of the makers, without restriction as to the use

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to be made of it, and was, by the makers, transferred to Frazier to indemnify him for accommodation acceptances for the defendants, but this point is not seriously contested by the defence, but it is insisted :

2. That Pritchett passed the notes to Frasier to raise money on, and that he took them encumbered with this condition, and could not use them in any other manner than the one designated.

Now it is admitted, that where paper is transferred for a specific purpose, it cannot be used by the holder for any other purpose than that designated; but the Court will not attach any technical meaning to the terms employed in the transfer, but will look only to a substantial compliance with the conditions attached to it. The inquiry is, did the paper substantially answer the ends for which it was transferred, and not whether it was done in the precise manner indicated. *Wardell v. Howell*, 9 Wendell, 170; Chitty on Bills, 12 Amer. from 9 London edition, 239, note 2d.

The language employed in the transfer in this case was, "You can relieve yourself by raising money on the notes." The act done, was to pass the paper to A. J. Frasier to meet debts of his own, to enable him to appropriate his own funds to the payment of the bill. This was a substantial compliance with the terms; it answered the end; it relieved him.

3. It will be seen from the letter of Frasier of the 22d of November, which is evidence in the record, that Frasier paid the bills of the 11th and 13th, before the maturity of the note, and while it was yet in his possession. Now it is laid down in Chitty on Bills, page 239, that if paper be transmitted to a party to get it

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discounted and take up other bills, and he fail to get it discounted, but pay the other bills with his own means, he may retain the transmitted bill for his indemnity, and sue the indorsers thereon. If he have a right to sue, he must also have the right to transfer, for both depend upon his property in the bill. This is the case at bar.

4. The suit being in the name of R. H. Frasier, for the use of A. J. Frasier, of course the right of recovery must depend upon R. H. Frasier's title, and no question can arise as to the title of A. J. Frasier.

McKINNEY, J., delivered the opinion of the Court.

This was an action of assumpsit upon a promissory note for \$1250.00, made by the firm of W. E. Newell & Co., payable to Jordan Eldridge & Co., at four months, and indorsed in blank by the payees, and also by W. T. Dortch. The makers and indorsers were jointly sued, and a recovery had against them; but only the indorsers have appealed.

It appears that R. H. Frasier, of New Orleans, accepted two bills of exchange, of five thousand dollars each, for the accommodation of W. E. Newell & Co., of Clarksville, Tenn., the first of which fell due on the 11th of November, 1856, and the other on the 14th of December following. There being no funds in the hands of the acceptor to meet the bill first due, J. H. Pritchett, one of the firm of Newell & Co., addressed a letter to Frasier, the acceptor, sometime after the 1st of Novem-

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ber, 1856, enclosing the note sued on, and another promissory note for \$4,000.00, and stated therein, "that he was not able to send the money to pay the bill; but he (Frasier) could relieve himself by raising money on the notes which were enclosed." It seems that no directions were given, nor were any restrictions imposed as regards the mode in which the notes were to be used or disposed of by Frasier; the foregoing statement in Pritchett's letter being all that was said upon the subject.

It seems that the notes did not reach Frasier until the 15th of November, and after he had paid the bill. On their reception, Frasier wrote to Pritchett, stating that the notes were worthless to him, for the purpose of raising money on them, as "country paper" would not command money in the market, and urging a remittance of the money, but retaining the notes. In a few days afterwards, to-wit, on the 18th of November, 1856, the firm of W. E. Newell & Co., failed, and made an assignment of their effects for the benefit of creditors.

Sometime after Frasier received said notes, the date is not shown in the record, he disposed of the note sued on for his own individual benefit, by transferring it, by delivery, to the plaintiff, A. J. Frasier.

The question submitted for our determination is, whether, as between Frasier and the indorsers, the former acquired such an interest in the note as entitled him to appropriate it to his own use, or to maintain an action thereon.

It is certainly well settled, that where a bill or note has been delivered to a person as agent, or for a

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special purpose, he and all other persons taking the same with a knowledge of the facts, must apply it accordingly. As where a bill or note has been received by the plaintiff to be discounted, he cannot apply it to his own use in satisfaction of a debt; and if he pays it away in discharge of a debt of his own, he will be liable to the party from whom he received it, in the same manner as if he had discounted the bill, and cannot avail himself of a set-off. Chitty on Bills, (Ed. of 1854,) 72, 198, marg.

But this principle, we think, has no application to the case before us. The notes were delivered to Frasier, generally, in the place of money, with an unlimited discretion to make any such disposition of them as might be thought proper, to enable him to meet the payment of the bill soon falling due. The object of the delivery was to "relieve" Frasier. And if Frasier might have made a valid disposition of the notes, before the maturity of the bill, to raise money to meet its payment; surely, he might, after being compelled to pay the bill, make an equally valid disposition of the notes in order to reimburse himself the amount paid out of his own funds. It is expressly laid down in Chitty on Bills, page 239, that if a bill be transmitted to a person to get discounted, and take up another bill to which he was a party, and he do not succeed in getting such bill discounted, but pays the other, he may retain the transmitted bill and sue the parties thereto, in order to reimburse himself the amount of the bill which he took up.

The statement of Frasier, that the notes were not available for the purpose of raising money in the mar-

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ket, cannot fairly be regarded as equivalent to a refusal to accept or retain the notes for his own benefit. But even if this were so, he was at liberty to change his determination; as it is manifest that the notes were sent with the intention that the proceeds should be applied for his indemnity. The failure of Newell & Co., in the aspect in which the case is presented, can have no influence upon the determination.

Judgment affirmed.

R. A. STONE *et al.* v. NANCY SANDERS *et al.*

1. STATUTE OF LIMITATIONS. *Act of 1715, ch. 48, § 9, protects heirs and representatives.* The act of 1715, ch. 48, § 9, is an absolute bar of all claims of creditors after the lapse of seven years, and it protects heirs and distributees as well as administrators and executors.
2. SAME. *Same. No exception as to insolvent estates.* The statute makes no exception in favor of claims filed under the insolvent acts, and the Court can make none. All are alike barred.
3. SAME. *Same. Case in judgment.* The intestate died in 1848. His administrator suggested the insolvency of the estate. The debts of the complainants were filed under the insolvent acts. Upon settlement with the clerk, in 1859, the administrator had only \$98 of assets in his hands. Certain slaves were recovered by the distributees of the intestate, and sold for division, in 1856. In October, 1857, the complainants filed their bill to subject the proceeds of said slaves to the payment of their debts. Held, that they were barred by the act of 1715, and the bill was properly dismissed on demurrer.

FROM STEWART.

This cause was tried upon demurrer, at the April Term, 1858, before FRIERSON, Chancellor, who dismissed the bill. The complainants appealed.

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KIMBLE, for the complainants.

ROBB and BAILY, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This bill was filed by two of the creditors of B. H. Sanders, deceased, to subject to their debts, amounting to about \$630, certain slaves in the hands of defendants, as distributees of the deceased.

The bill states that B. H. Sanders died in Stewart county, and Wm. C. Rutland administered on his estate in March, 1848, and in September of the same year, suggested the insolvency of the estate, and in May, 1850, made his inventory, and settled with the Clerk of the County Court, showing the amount of the assets for distribution to be only \$98.55. The complainants filed their claims, which yet remain unpaid, there being no assets except the small amount above reported. The bill further charges, that there were "no assets to pay them, until a recovery was had of certain negroes of said B. H. Sanders, by W. F. Sanders, by his next friend, A. Sykes, against Mary Bingham, Thos. H. Sanders, and Nancy Sanders. Your orators show that said negroes, so recovered, were, by order of your honor, sold in order to division among the distributees of B. H. Sanders, to wit, W. F. Sanders, Thos. H. Sanders, and Nancy Sanders, the widow, on the 20th of June last, for the sum of \$2,000, to John T. Baily, on a credit until 1st of April, 1857." This bill was filed the 16th of October, 1857—the money being still unpaid—praying that an amount sufficient to pay their debts be retained in the

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hands of the clerk and master, and so applied on final decree.

This bill was dismissed on demurrer, upon the ground that complainants were barred by the statute of limitations of 1715, ch. 48, sec. 9, Car. & Nich., 72. That section is, "The creditors of any person deceased shall make their claims within *seven* years after the death of such debtor, otherwise such creditor shall be forever barred." This section is in force, and protects heirs as well as administrators and executors. 5 Hay., 1, 28, 224; Mar. & Yer., 253, 6 Yer., 224. These decisions have been constantly adhered to, and there are no exceptions or savings in this act.

The time of delay is shown by the bill to be from March, 1848, to October, 1857—at least nine years and six months from the administration. There is no exception in favor of a claim filed under the insolvent acts; and if that could be regarded as such, it could not apply to any case other than assets subsequently acquired by the administrator. But this is shown by the bill to be a case where the heirs, or one of them, recovered these negroes, and it does not appear that they were claimed as assets by the administrator, nor that it was his duty to reduce them to possession as such. But if this did appear, it would not change the case, as these creditors, as well as the administrator, could have sued for them, and had the appropriation made to their claims. The title to slaves, as we have several times held, passes to the distributees, subject only to the payment of debts, and the personal representative can only claim them for that purpose. 1 Sneed, 365. These slaves, then, not being liable for debts,

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after seven years from the death of intestate, are protected in the hands of the distributees, as well against the creditor as the administrator. Though the debts may be just, they are lost by the delay and negligence of the creditors, and the defendants have an unincumbered title to them.

The decree will be affirmed.

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4. **SPECIFIC PERFORMANCE.** *Abatement of price.* The purchaser of land, if he chooses, is entitled to have the contract specifically performed as far as the vendor can perform it, and to have an abatement of the purchase money for any deficiency in the title to the land. If the title is, in part, defective, the vendor cannot require the vendee to annul the contract as to the whole; but the vendee may, if he chooses, retain the land so far as the title is perfect.
2. **SAME.** *Doubtful title.* A Court of Equity will not compel a purchaser to take a doubtful title to land. Before the vendor can require the purchaser to execute the contract, he must show that he is in an attitude to make him a good title.
3. **TRUST AND TRUSTEE.** *Sale of land. Purchase by next friend.* A person assuming a fiduciary relation toward another, in regard to property, is bound to exercise for the benefit of the *cestui que trust*, all the rights, powers, knowledge, and advantages of every description, which he derives from the position, or acquires thereby. These duties cannot be performed by a *next friend*, who also becomes the purchaser of the property. The two relations are repugnant, and a Court of Chancery will not allow them to be united in the same person.
4. **CASE IN JUDGMENT.** Land was sold under the decree of the County Court. The *next friend* of the minors became the purchaser. He subsequently sold the land, which passed into the hands of other parties. The complainant became the purchaser of the land thus sold, but, before payment of the purchase money, filed a bill for a rescision of the contract, as to the interest of said minors, because of the doubtful character of the title. Held, that the complain-

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ant is entitled to hold the land so far as the title is perfect, but the next friend of the minors had no right to become the purchaser, and the sale, as to them, is void; and the complainant is entitled to have an abatement of the purchase money, to the extent of the defect in the title.

FROM OVERTON.

This cause was tried at the April Term, 1858, before VAN DYKE, Chancellor, who decreed for the complainant. The defendants appealed.

JONES, for the complainant.

SWOPE, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

This is a bill seeking the specific performance of a contract for the sale of a tract of land; or, if the defendant cannot make a valid title to the entire tract, that complainant may have a decree for such portion of it as they may be enabled to make a title to, and compensation or abatement out of the purchase money as to the residue.

This land was purchased of defendants, William Smith and Jesse R. Linder, by one Davis, at the price of \$425.00. To secure the payment of which, he executed to them his four notes, payable at one, two, three and four years from their date; the second note being for \$125.00, and the other three for \$100.00 each. And they executed to him a bond, in which they became bound to make him a deed and title in fee simple, with covenants of general warranty, to the land, upon his payment of the purchase money.

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Afterwards, the complainant purchased this contract from Davis, took of him an assignment of the title bond, and became bound to pay defendants for the land, and executed his own notes to defendants; and Davis, with the assent of defendants, was let out of the contract altogether, and ceased to have any further interest in it.

The complainant has paid no part of the purchase money, except the first note, and this was paid partly in a note upon Kendall & Windle, for \$99.80, due the 28th of September, 1856, which he assigned to defendants, waiving demand and notice, and upon which the sum of \$15.80 had been paid, prior to the assignment, by the makers.

He seems to have withheld further payment until it was ascertained if defendants could make him a title to the land. And in the bill he prayed for and obtained an injunction to restrain the transfer of the notes until the title was settled.

At the time of filing the bill only one of the notes had matured, and the last one is yet to fall due.

This land once belonged to George Linder, who died *intestate*, and it came by descent to his heirs at law, viz.; Sarah Smith, wife of defendant William Smith, Nancy Smith, and defendant Jesse Linder, children of the *intestate*, who were of age; and also to the children and heirs at law of Milly Smith, deceased, who was a daughter of the *intestate*, and who were infants and without guardians; and each of these heirs being the owner of a share of one-fourth, as tenants in common, the children of Milly Smith, in right of their mother, being also entitled to a share of one-fourth.

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A petition was filed in the County Court of Overton county by these heirs, for a sale of this land for partition. A decree was had, and the land sold by the clerk of that Court, on the 21st of December, 1854; and the same was purchased by the defendants, at the price of 311.50, which appears, at that time, to have been a fair price; and the title was decreed to them by the County Court. After this, they, claiming by this decree to be owners of the whole tract, sold the same to complainant in the manner hereinbefore stated.

The children of Milly Smith were not made *defendants* in the petition, but united with the adult heirs as *complainants* in praying for the sale. They filed the petition by the defendant, Jesse Linder, *as their next friend*. He was, at the time, their uncle and co-heir in the estate; and as before stated, with William Smith the husband of one of the adult heirs, became a purchaser of the land under the decree.

The complainant makes no question here as to the title of three-fourths of the land, to-wit, the shares of Sarah Smith, Nancy Smith, and Jesse Linder, and claims to have that much of the tract decreed him. The defendant, on the other hand, maintains that he is in a condition to make a title to the whole tract, and that if he cannot, complainant should have no part of it; but that the sale should be rescinded if it cannot be entirely executed.

The land has increased in value since the sale under the decree, and is now worth \$630.00.

Upon these facts, we are of opinion that complainant is entitled to a decree for three-fourths of his land,

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and that he is not bound to accept the title as to the other one-fourth.

It is settled as a general rule, that the purchaser, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement out of the purchase money, for any deficiency in the title of the estate. 2 Story's Eq., sec. 779; *Paion v. Rogers*, 1 Ves. & B. R., 352.

As to the share or one-fourth belonging to the children of Milly Smith, it is not necessary for us to pronounce conclusively as to the effect of the decree upon their rights. It is enough for us to say, that this portion of defendant's title is so doubtful, that complainant is not bound to accept it.

It is well settled, that a Court of Equity will not compel a purchaser to take a doubtful title. *Sebring v. Mersereau*, 9 Cowen, 844.

If the decree of the County Court be ever so regular, we apprehend that Jesse Linder, while holding the *relation of next friend* to these infants, could not, as against them, become the purchaser of their share in this estate, and hold it. Such a purchase would inure to their benefit, and create a trust in their favor, and it would be optionary with them to claim the estate from him, or any one holding under him, with notice of the trust.

If this was a case under the Code of Tennessee, the purchase would be void, and the infants might bring ejectment.

In section 3339, a guardian or next friend, in any suit for the sale of a minor's land, is prohibited from becoming a purchaser at the sale under the decree, or at any time

afterwards, until five years from the removal of the existing disabilities.

But we think, upon well established principles of equity existing in the common law, such a purchase would not be allowed to stand. It is an equitable maxim, that a trustee is disabled to purchase for his own benefit, at a sale of the trust property. The principle is, that a person assuming a fiduciary relation towards another in regard to property, is bound to exercise for the benefit of his *cestui que trust* all the rights, powers, knowledge, and advantages of every description, which he derives from that position, or acquires by means of it.

It was his duty, as the next friend of these infants, to see that this property sold for the highest price; and his interest, as purchaser for himself, was to get it at the lowest.

These two relations were so essentially repugnant, that a Court of Chancery will never allow them to be united in the same person.

The principle is applied to any one who acts representatively, or whose office is to advise or operate, not for himself, but for others, and embraces administrators, executors, guardians, attorneys at law, general and special agents, assignees, commissioners, sheriffs, and all persons, judicial or private, ministerial or counselling, who, in any respect, have a concern in the sale of the property of others. It extends to sales by public auction, and to judicial sales, as well as to private ones; and embraces all cases wherever a confidence is permitted, a duty is assumed, or where one person is placed in such relation to another, by the act or consent of that other, or by

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the act of a third person, or of the law, that he becomes interested for him in any subject of property or business; and hence he is prohibited from acquiring rights in that subject, antagonistic to the person with whose interests he has become associated. *Keech v. Sandford*, and notes, *Fox v. McKreth*, and notes, Leading Cases in Equity, 47 to 58, 105 to 145.

And we are not sure but that these principles apply equally to the purchase of defendant, William Smith, so far as these minors are affected.

The Chancellor took this view of the case and we affirm his decree, with costs.

The complainant, so far as he has not done so, will be required to pay defendant three-fourths of the purchase money, including the note on Kendall & Wendle, with proper interest; and, upon doing so, will be entitled to a deed, with covenants of warranty, from the defendants, for three-fourths of the land. As to the share of one-fourth, belonging to Milly Smith's children, the same will be restored to defendants; and if any account as to rents or improvements, as to that share, be necessary or desired, the same may be taken.

This cause is remanded to the Chancery Court at Livingston, to the end, that this decree may be executed.

Dickinson, Guardian, &c. v. Cruise.

DICKINSON, GUARDIAN, &c. v. CRUISE.

1. **SLAVES.** *At the risk of the hirer. Fraud and warranty.* The health and life of a hired slave, in the absence of fraud or a warranty on the part of the owner or his agent, are at the risk of the hirer. And this is so whether the slave, at the time of the hiring, was sound or unsound. The hirer is bound for the hire, although the slave die immediately after he gets him into possession.
2. **NEW TRIAL.** If the verdict is wholly unsupported by the evidence, a new trial will be granted.

FROM LINCOLN.

This cause resulted in a verdict for the defendant, MARCHBANKS, J., presiding. The plaintiff appealed.

BRIGHT, for the plaintiff.

KERCHEVAL, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

In this cause there must be a new trial, because the verdict of the jury is wholly unsupported by the evidence.

On the first day of January, 1856, John M. Smith, as agent of F. A. Dickinson, guardian of John A. Gracy, hired a negro man, John, to the defendant, for that year, for \$132. The negro was delivered to the defendant the next day, and soon thereafter, and during the same

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month, died of typhoid fever, and rendered no service to the defendant.

He resisted the payment of the hire, and the jury rendered a verdict for him.

That the health and life of the negro after the hiring, in the absence of fraud or a warranty on the part of the plaintiff, were at the risk of the defendant, is not controverted. And this is so, whether he, at the time of the hiring, was sound or unsound. *Wharton v. Thompson*, 9 Yer., 45.

There is no evidence in this record of any warranty, or that the plaintiff, or his agent, had any knowledge of the unsoundness of the slave at the time of the hiring, or in any way deceived or imposed upon the defendant. So far from this, the contrary is clearly shown.

There are but two witnesses who speak upon the subject, namely: Smith, the plaintiff's agent, who hired the negro, and Dr. McElroy, the attending physician. The latter only establishes the illness and death of the slave, and makes it probable that the disease of which he died was upon him when he was hired. The former proves, positively, that if he was sick at the time he hired and delivered him, he did not know it. That he looked as well as he ever did, and did not complain; and that he had seen him chopping wood at Thomson's during the Christmas holidays. He further proved that the slave was not present when he was hired, but that defendant had seen him a day or two before; and was to loose all time, and furnish the usual clothing—the plaintiff paying the doctor's bills, if the slave become sick.

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This is the amount of the proof. And we think there is no reasonable ground upon which to presume the verdict correct.

The jury must have acted upon the hardship of the case, disregarding the rules of law applicable to it. 9 Yer., 270.

Reverse the judgment, and remand the cause for another trial.

M. DRAPER *et al.* v. JAMES KIRKLAND.

EJECTMENT. *Venue.* Act of 1848, ch. 173. The action of ejectment is in its nature local, and must be instituted in the county where the land lies. If commenced in the wrong county, the defendant may take advantage of it on the trial. The act of 1848, ch. 173, only applies to cases where the land *in dispute* is situated in two or more counties. If the land sued for is altogether in one county, the suit must be brought in that county, although the grant covering it may embrace lands in another county.

FROM PUTNAM.

This cause was tried before GOODALL, J., at the March Term, 1858. Verdict and judgment for the defendant. The plaintiffs appealed.

J. P. MURRAY, for the plaintiffs.

SAML. TURNEY, for the defendant.

M. Draper *et al.* v. James Kirkland.

WRIGHT, J., delivered the opinion of the Court.

This was an action of ejectment in the Circuit Court of Putnam county; and the writ and declaration were executed and served upon defendant in that county, where the cause was tried. But the land in dispute, claimed and occupied by the defendant, lies entirely within the county of DeKalb, but is embraced within a grant of 5,000 acres to the plaintiffs, which lies partly in both of those counties.

The Circuit Judge held the suit could not be maintained in Putnam county. In this there is no error.

At the common law this action is in its nature local, and must be brought in the county where the land lies. If commenced in the wrong county, the defendant may avail himself of it on the trial. *Hathorne v. Haines*, 1 Greenleaf's Rep., 238.

This rule of the common law, as applicable to this case, is unchanged. The act of 1848, ch. 173, (Acts 1847-48, page 280,) only applies where the tract of land in *dispute* lies in two or more counties, and can have no application to a case like this.

The oath taken by the defendant in *forma pauperis*, as a substitute for the bond for costs, upon being permitted to defend the action, is a substantial compliance with the law; and the Circuit Judge decided right in so holding. 2 Meigs' Dig., 826.

The judgment is affirmed.

Thos. J. Draper, Adm'r of Goodall v. State, for the use of McLellan.

THOS. J. DRAPER, ADM'R OF GOODALL v. STATE, FOR THE
USE OF McLELLAN.

1. SHERIFF. *What amounts to a payment.* A sheriff or other collecting officer has no power to receive anything in satisfaction of a claim placed in his hands for collection but money, or bank notes circulating as such, without authority from the plaintiff. A payment in any other way is no satisfaction of the judgment, and the plaintiff may proceed against the debtor.
2. SAME. *Is liable to the plaintiff. Deputy.* The officer, however, would have no right to make this objection in a proceeding against him. His liability would be the same as if he had received the money. And upon principle, an officer would be bound to the same extent, by the act of his deputy.
3. SAME. *Sureties not bound.* Sureties are only bound for the official acts of their principal, and may go behind the act and test their liability by the real transaction. They may show that the act complained of was outside of, and not authorized by his office. If so, they are not liable.
4. JUDGMENT. *Cannot be set aside as to one and stand against others.* A judgment cannot be divided. If it is correct against one party, but erroneous as to others, it cannot be affirmed as to him, and set aside as to the others. There must be a general reversal.

FROM JACKSON.

Verdict and judgment for the plaintiff, at the July Term, 1858, GARDENHIRE, J., presiding. The defendants appealed.

QUARLES and J. P. MURRAY, for the plaintiff in error.

DENTON, for the defendant in error.

Thos. J. Draper, Adm'r of Goodall v. State, for the use of McLellan.

CARUTHERS, J., delivered the opinion of the Court.

Goodall was the sheriff of Jackson county, and Galbreath his deputy. McClelland placed sundry claims in the hands of the latter for collection, and among which was one for thirty-two dollars against Benj. Fox, to which case alone, this controversy is confined. Galbreath obtained a judgment against Fox and receipted him for the amount, but failed to pay over the money; and this suit was brought upon the official bond of Goodall, after his death, against his administrator and the sureties in his bond. A verdict was had for \$24, and judgment rendered against all the defendants, and an appeal in error, by all, to this Court.

Some technical objections are taken to the bond, the formality of its execution, and the record of the County Court, which need not be noticed.

But an objection presents itself in the record of a more formidable character. The claim upon Fox was not collected in money, although he entered his receipt upon the docket in general terms. The fact was, as explained by Fox who was examined as a witness, that he had an account or claim against the officer, Galbreath, for nearly the same amount, and about the time the stay expired, that was taken in extinguishment of the judgment. If a sheriff or clerk receive anything else but money on a judgment, or otherwise, in their offices, it is not binding upon the parties for whom they are acting; it is no satisfaction of the judgment, and the plaintiff may proceed upon it as before. In such a case the defendant may be made to pay it again. The officers receiving property, or anything but money, or bank notes circu-

Thos. J. Draper, Adm'r of Goodall v. State, for the use of McLellan.

lating as such, in the absence of instructions, are acting out of their line of duty—as individuals, not officers—and their securities are not liable. *Lytle v. Etherly*, 10 Yer., 389; 5 Hum., 18. There is no principle better settled than this.

The officer, however, would have no right to make this objection in a proceeding against him. His liability would be the same as if he had received the money; it would not do to allow him to dispute his own act, or defend himself upon the ground that he acted without authority, or in violation of his duty. And we think, upon principle, an officer would be bound to the same extent by the act of a deputy. But the sureties may go behind the act, and test their liability by the truth of the case and the real transaction. Being only bound for the acts of their principal in his office, they may show that the act complained of was outside of his office, and not authorized by it. In this case, then, the sureties of Goodall are not liable, and the verdict and judgment against them are erroneous. The Court charged the law correctly on this point, but he was not sufficiently explicit. He charged that the sureties would be liable if *money* was collected; but if the receipt was given without that, but on discharge of an adverse claim against the officer, that is, whether he got the money or not, the principal would be bound; so we hold, but in the last case the sureties are not liable. This he did not say, but it *should* have been inferred. For this we would not reverse, as the Judge was not asked to give more explicit instructions, and there is no error in what he did say. Yet we must, necessarily, reverse the judgment, because there is no

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proof making a case that would authorize a verdict against the sureties, but it is all the other way. The verdict is right against the administrator of Goodall, but it is joint, and we know of no law by which we could set it aside as to some of the defendants, and affirm as to others.

So there must be a general reversal, and a new trial.

JONATHAN FORD v. B. W. THOMPSON.

1. **CONSIDERATION.** *Failure and want of. Cross-action.* Act of 1856, ch. 71. Code, § 2918. By the act of 1856, ch. 71, which, in substance, is incorporated into the Code, § 2918, a defendant may, by way of defence, avail himself of *any matter* arising out of the plaintiff's demand, for which he is entitled to recover in a cross-action. He may, also, avail himself of *any matter* growing out of the original consideration of any written instrument, whether with or without seal, for which he is entitled to maintain a cross-action.
2. **SAME.** *Same. Defence to in the hands of an assignee.* This right of defence exists equally against the assignee of the original party, when the demand has passed into his hands, subject to the equities by which it was affected in the possession of the assignee.

FROM GILES.

This cause was tried before MARTIN, J., and resulted in a verdict for the plaintiff. The defendant appealed.

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WALKER and BROWN, for the plaintiff in error.

JONES and WARD, for the defendant in error.

MCKINNEY, J., delivered the opinion of the Court.

This was an action of debt brought by Thompson, as assignee of a note under seal, for \$850.00, executed by Ford to one Barrett. The defence was failure and want of consideration.

The note was given as part of the price of a female slave, sold by Barrett to Ford, with a written warranty of soundness, and of good title. The note was assigned after it fell due.

On the trial, the defendant, Ford, proposed to prove that the slave was diseased and unsound at the time of the sale; and also offered to read the bill of sale made to him by Barrett, warranting the title and soundness of the slave; but the Court refused to admit the evidence. He likewise offered to read a certified copy of a deed of trust executed by Barrett, sometime prior to the sale of the slave to defendant, by which said slave had been conveyed to a trustee for the indemnity of a creditor of Barrett's; but this was also refused by the Court.

It seems that the Court refused to admit the evidence on the ground, "that the defendant still had said slave in his possession, and had not been disturbed in the possession of the same."

The exclusion of the evidence was erroneous in every view of the case, but more especially so in view of the act of 1856, ch. 71, the substance of which has been

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incorporated into the Code, sec. 2918; and to this latter view of the case we will confine ourselves. By this statute, the defendant may, by way of defence to the action, avail himself of *any matter* arising out of the plaintiff's demand, for which he would be entitled to recover in a cross-action. He may also avail himself, in like manner, of *any matter* growing out of the original consideration of any written instrument, whether with or without seal, for which he would be entitled to maintain a cross-action.

And this right exists equally against the assignee of the original party, where the demand has passed into his hands subject to the equities by which it was affected in the possession of the assignor.

Under these express statutory provisions it is clear that the evidence offered was admissible, either to establish a partial, or total failure or want of consideration.

Judgment reversed.

ROBERT P. DONNELL, ADM'R v. JOSIAH DONNELL.

GIFT. *Inter vivos*. Choses in action and money are the subject of a valid donation *inter vivos*. An endorsement, or mere delivery accompanied by words of donation, will be sufficient to pass the title, and vest in the donee a property in them.

FROM WILSON.

Decree for the defendant, at the July Term, 1858, RIDLEY, Chancellor, presiding. The complainant appealed.

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MARTIN, HEAD, and TURNER, for the complainant.

STOKES and GUILD, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

This is a bill filed by the complainant, as the administrator of Robert Donnell, for the recovery of certain notes and money in the possession of the defendant, which, it is alleged, belong to the estate of the intestate.

The defendant claims the notes and money as a gift from the intestate, who was his brother.

The bill attacks the defendant's title upon the ground that no gift was made; and if made, that it was obtained from the intestate, whose mind had become so impaired as to be incapable of business, by fraud and undue influence.

It is alleged that the endorsements of the intestate to the defendant, upon the notes held by him, were fraudulently obtained by him; and in the proof taken by complainant, he attempts to establish that these endorsements were, in fact, never made by the *intestate*.

It is shown that the intestate, who was never married, lived with defendant for some years previous to his death, and was nursed and taken care of by him.

It is also shown that defendant had access to his papers and money. And though the intestate had been attacked with paralysis, he was, nevertheless, a man of strong will and intellect, who acted for himself, and looked closely after his interest.

Much proof has been taken on both sides, but we do not deem it necessary to review it in detail.

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We think, from the entire record, it is established that the intestate was of sound mind, and entirely competent to make to defendant the gifts set up in his answer.

Indeed this is not seriously questioned, and cannot be.

Moreover, the proof shows to our satisfaction that the endorsements, in the name of the intestate upon the notes claimed by the defendant, are authentic, and were made by him, and intended as *gifts* from the intestate to defendant; and that defendant is entitled to both the notes and money claimed in his answer, as gifts from the intestate. In so holding we carry out the declared purpose of the intestate.

His hand-writing and signature to the endorsements are proved by many witnesses; and, that he had *made the gifts*, he declared to several witnesses whose testimony is in the record.

The proof extends to the money as well as the notes claimed by defendant.

It not only shows a purpose to *give*, but that the *gift* had been actually executed.

Indeed, upon reading the bil, it is manifest it was not seriously intended to call in question the fact that Robert Donnell had made the endorsements.

The case is put upon his want of capacity, and that advantage had been taken of him by the defendant.

But there is no reason to suppose that he was, in any way, improperly influenced or imposed upon.

We have, then, *particular* and *specific* proof of the *gifts*; the declarations of the intestate that he *had given* the money and notes by name, and had *endorsed* them.

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Most of the notes are filed, and the endorsements of the *intestate* found upon them and established by the weight of the proof.

In opposition to this, complainant has filed a mass of proof showing that defendant did not claim those notes *after* the date of the endorsement, but treated them, as well as the money, as the property of the intestate, down, almost, to the period of his death.

And it must be admitted that this proof is very strong against the defendant.

On the other hand, he alleges that he pursued this course because it was the wish of his brother that he should do so. And he shows that he did frequently speak of these gifts.

Strong as is the complainant's proof, we do not think it sufficient to overturn the evidence for the defendant.

We feel constrained to hold that the gift in favor of defendant is established. *Brunson v. Brunson*, Meigs' Rep., 630.

Decree affirmed.

THE STATE v. WILLIAM CLENNY.

CRIMINAL LAW. *Plea of former conviction. Replication.* The plea of a former conviction before a justice under the small offence law, to an indictment for a misdemeanor is good, without the averment that the trial and conviction before the justice were not fraudulent

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and intended to shelter the defendant from the punishment due his offence. If the State intends to rely upon any such thing to avoid the force of the plea, it must be put in issue by replication.

FROM WHITE.

The defendant was indicted for an assault and battery. He plead a former conviction before a justice of the peace. To this plea the Attorney General put in a demurrer, which was overruled by the Court. GARDENHIRE, J., presiding. The State having declined to reply to the plea, the defendant was discharged. The State appealed.

SNEED, Attorney General, for the State.

COLMS, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

The defendant was indicted in the Circuit Court of White county, at the September Term thereof, 1857, for an assault and battery upon one J. W. Mitchell.

To this indictment he pleaded a former conviction before William Clayton, a justice of the peace of said county.

To this plea the Attorney General, on the part of the State, demurred. The Circuit Court overruled the demurrer, and the State declining to plead further, the defendant was, by order of the Court, discharged. From this judgment the State appeals.

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It is now argued that the plea is bad, because it does not aver that the proceeding before the justice was *not had by the procurement* of the defendant; in other words, that the trial and conviction before the justice were not fraudulent and intended to shelter the defendant from the punishment due his offence.

We are of opinion that the plea was good without this averment. No statute upon the subject requires that this plea should be so drawn, and we are aware of no decision that goes this length. We do not understand, that at common law, either in civil or criminal proceedings, where a former judgment or conviction were relied on as a defence, that the plea should negative the existence of fraud.

It is true that, to render the conviction before the justice of any avail as a defence, it must be free of fraud or collusion. But if the State intend to rely on any such thing to avoid the force of the plea, it must be by replication. *State v. Colvin*, 11 Hum.. 599; *State v. Lowry*, 1 Swan, 34; *State v. Epps*, 4 Sneed, 552.

Judgment affirmed.

WILLIAM WOODFOLK v. WILLIS CORNWELL.

BOUNDARY. Re-marking. Case in judgment. A party cannot, by an *ex-parte* survey and marking of the lines, fix the boundary of his land different from that called for in his deed. Thus, in 1809, the plaintiff and his vendor surveyed and marked the lines of the land claimed by him. This survey was made without the knowledge of the adjoining

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owners, and was a departure from the calls of the deed. It is held, that the deed controlled the boundary, and that the plaintiff is not entitled to hold the land included by his survey.

FROM JACKSON.

This cause was heard before GOODALL, J., at the March Term, 1858. Verdict and judgment for the defendant. The plaintiff appealed.

MERIGS and QUARLES, for the plaintiff.

FITE and J. P. MURRAY, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an action of trespass *quare clausum fregit*. The question presented for our determination is, mainly, one of boundary.

The plaintiff claims, under a conveyance from the heirs of Hardy Murfree. The proof shows, that on the 13th of October, 1791, one Harney, who was the grantee of a tract of 7200 acres, from the State of North Carolina, conveyed to H. Murfree 1440 acres lying in the southwest corner of said grant. Said conveyance calls to begin at a large sugar tree, the southwest corner of the Harney grant; thence along the line of said grant north, 792 poles; thence east 291 poles; thence south 792 poles, to Harney's line; thence west, with his line, 291 poles, to the beginning. On the 10th of October, 1808, H. Murfree, by a memorandum in writ-

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ing, contracted to sell said land to the plaintiff, Woodfolk; and after the death of said Murfree, to-wit, on the 23d of October, 1828, his heirs made a conveyance in pursuance of said contract made by their ancestor. This conveyance pursues, precisely, the calls of the deed from Harney to Murfree, above set forth; no object or land-mark being called for, except the large sugar tree, the beginning corner, which is described as a corner of Harney's grant.

The proof shows, that in 1809, Hardy Murfree and the plaintiff procured a survey to be made of the 1440 acres above described. This survey was made, as it seems, at their own suggestion, without the knowledge or concurrence of the adjoining owners. They commenced at, what was assumed by them to be, the sugar tree called for as the southwestern corner of the Harney grant; and run and marked the several lines, according to the courses and distances called for in the deeds from Harney to Murfree, and from the heirs of the latter to the plaintiff. And the plaintiff insists, that by this survey and marking of the lines, the location and boundaries of said land were definitely fixed as against all persons. This is denied on the part of the defendant, who alleges that said survey was an entire departure from the true calls of the deeds from Harney to Murfree, and from the heirs of the latter to plaintiff. The defendant insists that the sugar tree, the southwest corner of the Harney grant and the beginning corner of his conveyance to Murfree, stood perhaps 100 poles west of the sugar tree at which the plaintiff's survey was commenced.

If the sugar tree claimed by the defendant be the

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true beginning of the 1440 acre tract, then, to run the lines according to course and distance from that point, the land upon which the alleged trespass was committed is not covered by the plaintiff's conveyance, but it is otherwise, if the sugar tree claimed by the plaintiff is to be regarded as the corner.

The first question, then, is a simple question of fact; which is the southwest corner of the Harney grant? The jury established the corner as claimed by the defendant; and all we need say upon this point is, that notwithstanding the conflicting and contradictory character of the proof, we think the decided preponderance is in support of the verdict.

The next question is, whether the instruction to the jury was correct? The Court, in effect, charged that the plaintiff was entitled to the land covered by his deed from Murfree's heirs. But that for an alleged trespass on land, outside of the proper boundary of the deed, though within the boundary fixed by the survey made in 1809, the plaintiff could not recover. This instruction, with reference to the facts of this particular case, we think was correct.

It will be borne in mind, as before remarked, that the calls of the deed to the plaintiff, are identical with the calls of the conveyance from the grantee to Hardy Murfree, in 1791. In both deeds the 1440 acre tract is bounded, on the south and west, by the lines of the original grant to Harney, and by these lines the location of the land must be fixed; for, it will be observed, the isolated question for our determination upon this record, is the proper location and boundary of said tract.

If, in truth, the southwestern corner of the grant,

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which was made the beginning of the 1440 acres, was an established corner, was it competent to the plaintiff or his vendor, by an *ex parte* survey in 1809, to depart from that corner and the line called for in the deed, running thence with the line of the grant 792 poles, and to establish a new corner and line 100 poles east of the true corner and western boundary of the tract? We think not. And the parties themselves seem to have so regarded it; for the conveyance from Murfree's heirs to the plaintiff does not purport to be based upon the survey of 1809. It does not pursue the marked lines then made. But, on the contrary, exactly conforms to the calls of Harney's conveyance. Whether or not the plaintiff, if his conveyance had pursued the survey of 1809, could have been regarded as entitled to hold the land included therein, upon the facts of this case, is a question not presented by this record, and we express no opinion upon it.

Judgment affirmed.

JOHN W. WOODSON *et al.* v. JEREMIAH SMITH *et al.*

1. **DEED OF GIFT. Construction.** The *habendum* of the deed is: "To have and to hold the said five negroes and their increase to the said George A. Lucas and Peter W. Lucas, and the heirs of her" (the donor's) "body, if any there be; to the sole use of the said George A. Lucas and Peter W. Lucas, and the heirs of her body, if any there be, after the said Sally E. Lucas' death." By this deed the donor

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reserved the possession and services of the slaves during her own life, vesting in the donees a present title to them, but postponing their right to the beneficial use or possession of said slaves, until her death.

2. **STATUTE OF LIMITATIONS.** *Adverse possession.* The possession of slaves by the tenant for life, is in perfect harmony with, and incapable in law of becoming adverse to the rights of the remaindermen. The possession of a purchaser of the life estate is precisely similar to the possession of his vendor, and he cannot acquire a valid title, as against the remaindermen, to the slaves, by an adverse holding. Neither will the statute of limitations commence running until the death of the tenant for life, because the right of the remaindermen to the possession of the slaves, did not sooner accrue to them.
3. **CHANCERY PRACTICE.** *Reference to the master.* According to the established course of chancery practice, the question of title to slaves is a matter proper for the determination of the Chancellor. It is not a proper matter of reference to the master.

FROM SMITH.

RIDLEY, Chancellor, pronounced a decree for the complainants, and ordered an account to be taken by the clerk and master. The defendant, Smith, appealed.

SPOKES, HEAD, and McLAIN, for the complainants.

FITE, for the defendant, Smith.

McKINNEY, J., delivered the opinion of the Court.

The complainants seek to recover certain slaves in the possession of the defendant, claimed by him as his property.

The principal question in the cause, arises upon the construction and effect of a deed of gift of several slaves, made by Sally E. Lucas, on the 31st of August,

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1812, to her two sons, George A. and Peter W. Lucas, and to any after-born heirs of the donor, if any should be born. The *habendum* of the deed, upon which the question arises, is as follows: "To have and to hold the said five negroes and their increase, to the said George A. Lucas and Peter W. Lucas, and the heirs of her" (the donor's) "body, if any there be, to the sole use of said George A. Lucas and Peter W. Lucas, and the heirs of her body, if any there be, *after the said Sally E. Lucas' death.*"

It is insisted for the defendant, that the latter words, which purport to reserve a life interest in the slaves to the donor, are void as being repugnant to the absolute gift of the slaves previously made to the donees.

We do not concur in this conclusion. It seems to us that the instrument is perfectly consistent and intelligible upon its face. It is clear, that while the donees are vested with a present title to the slaves, their right to the beneficial use or possession of them was not intended to take effect until after the donor's death. She intended to reserve the possession and services of the slaves during her own life. This it was lawful for her to do. And the words employed to express such intention, are explicit, and amply sufficient to effect the end in view. We hold, therefore, that the beneficial use and possession of the slaves was in the donor for life, and did not pass to the donees until her death.

From the position just announced, it follows, of course, that the defendant cannot avail himself of his adverse possession of the slaves in controversy. The defendant's purchase of the slave Fanny, (one of the

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five slaves included in the deed of gift,) could have no other effect than to vest him with the life interest of the donor in said slave. He was, as to said slave, in effect, placed in the shoes of the donor; and his possession was, as respects the donees, precisely similar to the possession of the donor of the remaining slaves named in the deed; that is, a possession in perfect harmony with, and incapable, in law, of becoming adverse to the rights of the donees during the continuance of the life interest of the donor. Until the death of the donor, the right of the donees to the possession of the slaves did not arise; and for this reason, also, the statute of limitations could not sooner attach.

The objections to the registration of the deed of gift, are not well founded. The defects are cured by positive legislative enactment.

The defendant, we think, by virtue of his purchase and conveyance from Sloan and wife, is vested with their interest in the slave Fanny and her increase.

The allegation of the bill, that complainant J. W. Woodson had acquired, by purchase, the interests of some of the other claimants of the slaves sued for, is not sufficiently supported by proof.

The truth of this allegation was a matter proper for the determination of the Chancellor, of which full and satisfactory proof ought to have been made. It is not a proper matter of reference to the master, according to the established course of a Court of Chancery. And for this irregularity the decree will be reversed, and the cause remanded, with leave to supply any omissions or defect of proof, upon any of the questions in the cause, if deemed necessary by the parties.

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THE STATE v. SAMUEL COWAN *et al.*

1. **CRIMINAL LAW. Indictment. Finding of the grand jury.** The grand jury cannot find a part of the same charge to be true and another part false, but must either maintain or reject the whole. Therefore, on an indictment for *murder* they cannot find a true bill for *manslaughter*.
2. **SAME. Same. Same. When different counts.** This rule does not extend to an indictment joining different counts, as each count is regarded as containing a distinct charge.
3. **SAME. Same. Same. Grand jury under the control of the Court.** The grand jury are under the control of the Court. It is the province and duty of the Court to see that the finding is proper in point of law, and if not, the Court may recommit an improper or imperfect finding, and may, if necessary, exercise the power of compelling a proper discharge of duty on the part of the grand jury.
4. **SAME. Duty of the grand jury.** The grand jury may safely, as a general rule, act upon the presumption that the law officer of the government has investigated the facts, and described the offence properly in the indictment; and their duty is, simply, to inquire whether or not a *prima facie* case is made out, as charged in the indictment.

FROM DAVIDSON.

Upon motion of the defendants, the Court, TURNER, J., presiding, quashed the indictment. The State appealed.

SNEED, Attorney General, for the State.

———, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

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At the September Term, 1858, of the Criminal Court of Davidson, an indictment for *murder* was preferred against the defendants, which was returned with the following endorsement on the back thereof: "The grand jury find a true bill for *manslaughter*." On motion of the defendants the Court quashed the indictment, and the Attorney General appealed in error.

The rule seems to be well established, that the grand jury cannot find one part of the *same charge* to be true, and another part false, but must either maintain or reject the whole. And, therefore, on an indictment for murder they cannot find a true bill for manslaughter. This is certainly a very technical rule, but the current of authority is in support of it. 1 Chitty's Cr. Law, 2; 1 Russ. on Cr., 312; 1 Arch. Cr. Pr., (by Waterman,) 98 to 104, note 5; 11 Hum., 602. The rule, of course, does not extend to an indictment joining different counts, as each count is regarded as containing a distinct charge.

The finding of the grand jury, in the present case, was certainly improper and ought not to have been received by the Court. It is not the province of the grand jury to ascertain, or determine the exact grade of the criminal act (in crimes that admit of degrees) of which the accused is charged in the indictment. This remains for the petit jury, charged with his trial, under the control and instructions of the Court.

If a *homicide* is established the grand jury may safely, as a general rule, act upon the presumption that the law officer of the government has investigated the facts, and described the offence properly in the indictment; and their duty is simply to inquire whether or

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not a *prima facie* case is made out as charged in the indictment.

The grand jury are under the control of the Court. And it is the province and duty of the Court to see that the finding is proper in point of law; and if not, the Court may recommit an improper or imperfect finding, and may, if necessary, exercise the power of compelling a proper discharge of duty on the part of the grand jury. Arch. Cr. Pr., 98, to 104, note 5.

But, as the Court was not called on to exercise this authority, error cannot be predicated of the judgment quashing the indictment.

Judgment affirmed.

LETSY CANNON v. FRIAR TRAIL.

1. **STAY OF EXECUTION.** *Order for stay.* Written authority to the justice to enter the party's name as stayor, must, upon its face, contain such reference to and description of the judgment, the execution on which is intended to be stayed, in some one or more particulars, as without the aid of extrinsic evidence will render it reasonably certain that the judgment referred to in the written authority is the identical judgment to which the stayor intended to become surety.
2. **SAME.** *Extrinsic evidence.* When the written authority thus indicates the judgment with reasonable certainty, extrinsic evidence is admissible to aid the defective description and identify, with more certainty, the judgment referred to in the order.
3. **SAME.** *Case in judgment.* The defendant executed the following writing: "Mr. Galbreath, Esq. You may set my name as stayor to a debt against John M. Warner, for about four hundred dollars, in favor of Letsy Cannon, in the hands of C. A. Warner. July 20th. 1857. "F. TRAIL. [SEAL.]"

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It is held, that this is specific enough to authorize the introduction of parol evidence to aid the defective description, and, if properly identified, the party would be bound as stayor.

FROM BEDFORD.

This cause was tried at the August Term, 1858, of the Circuit Court, DAVIDSON, J., presiding. Verdict and judgment for the defendant. The plaintiff appealed.]

KEEBLE and BUCHANAN, for the plaintiff.

WISENER and CALDWELL, for the defendant.

WRIGHT, J., delivered the opinion of the Court

On the 11th of July, 1857, Wm. Galbreath, a justice of the peace of Bedford county, rendered a judgment in favor of Letsy Cannon against John M. Warner, as principal, and John W. Rutledge and R. P. S. Kimbro, as endorsers, for \$470.86 and costs.

On the 20th day of the same month, F. Trail, the defendant in error, wrote and handed to said Warner the following instrument:

"Mr. Galbreath, Esq. You may set my name as stayor to a debt against John M. Warner for about four hundred dollars, in favor of Letsy Cannon, in the hands of C. A. Warner. July 20th, 1857.

"F. TRAIL. [SEAL.]"

The plaintiff proved by Wm. Galbreath, the justice who rendered the judgment, that John M. Warner brought

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him the above order, and that with the consent of Letsy Cannon, the plaintiff, he received it and entered said Trail as stayor to the judgment.

This order was the only evidence of Trail's consent to be the stayor.

The plaintiff offered to prove by C. A. Warner, that he was the deputy sheriff of Bedford county, and that the note upon which said judgment was rendered, was placed by the plaintiff in his hands to collect; that he took out the warrant against the maker and endorsers, and returned the same to William Galbreath, for trial, and that he had no other debt against said John M. Warner in favor of the plaintiff; and, by said Galbreath, that there was no other judgment in favor of the plaintiff against John M. Warner, rendered by him.

But the Circuit Court rejected this evidence, and held the order to be invalid and insufficient upon its face, and that extrinsic testimony could not be received to aid it, so as to bind the defendant.

In this we think the Circuit Court erred.

The cases of *Barr v. McGregor* and *Rhodes v. Chappell*, 11 Hum., 518-527, establish the principle, that if the description of the judgment to be stayed be not full, extrinsic evidence may be received to aid the defective description. But that the written authority to the justice must, upon its face, contain such reference to, and description of the judgment, the execution on which is intended to be stayed, in some one or more particulars, as without the aid of extrinsic evidence, will render it reasonably certain that the judgment referred to in the written authority is the identical judgment to which the stayor intended to become surety.

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But that parol evidence can be of no avail to establish that the written authority was intended to apply to a judgment to which the writing upon its face, in *no one certain and distinctive particular*, relates.

An application of these rules to the authority in the present case, and the extrinsic evidence given and proposed to be given, and excluded by the Court, will, we think, show that the defendant in error was bound as stayor in the case.

The authority was certainly not void upon its face.

It described the debt as about four hundred dollars, in favor of Letsy Cannon against John M. Warner, in the hands of C. A. Warner; and, evidently, referred to a debt in judgment, or to be put in judgment, before a justice of the peace by the name of Galbreath; for it can have no other meaning.

Now who would say that if the extraneous evidence had shown a state of facts corresponding in every particular with this written authority, in the persons, amount, and justice referred to, it was invalid as an authority? We think no one.

The question then is, does the extrinsic evidence sustain the description in the written authority with sufficient certainty? And we think it does.

In the two cases before referred to, there was no reference whatever in the writing to the amount of the debt or judgment to be stayed. Here it is described as *about four hundred dollars*; and it is shown by the proof to be \$470.86. This latter sum, we think, may be embraced within the former. In *Brown v. Weir*, 5 Serg. & Rawle, 401, where a debt was described in an assignment as *about \$11,000*, which was, in fact, up-

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wards of \$13,000, it was held the trust included the latter sum. See, also, the case of the *Dedham Bank v. Richards*, 2 Metcalf, 105; Burrill on Assignments, 252.

Here the plaintiff, Letsy Cannon, and the defendant, John M. Warner, are accurately described.

The judgment is shown to have been before William Galbreath, a justice of the peace of Bedford county, and that there was no other judgment or justice to which the writing could refer. And it is also further identified by the fact that this claim was in the hands of C. A. Warner, a deputy sheriff of Bedford county, for collection.

But it is said, that though the debt was against John M. Warner, yet it was also against two additional parties, to wit, Rutledge and Kimbro, not mentioned in the authority. This is true; but they were merely *endorsers*, and he the *principal debtor*. And, besides, he could stay it without them; and it was, no doubt, regarded as his debt. Moreover, this objection is held in *Dilliard v. Askeu and Lancaster*, 3 Hum., 536, to have nothing in it.

It is next objected that the judgment was rendered the 11th, and the authority for the stay is on the 20th of July. But a judgment may be stayed at any time before it is paid, or execution issued, by the plaintiff's consent. 10 Hum., 272.

It is finally said, the authority upon its face refers to a *debt not in judgment, in the hands of C. A. Warner*, and that, in fact, this debt was *then* in judgment, and not in the hands of Warner, and so not within the authority. But this is not the true construction of the authority. It evidently embraced *the debt*,

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whether in judgment or not. And we know that when a claim is placed with an officer for collection, it is universally understood to remain in his hands and under his management, until the money is collected and paid over to the creditor.

We think, therefore, that it appears with sufficient certainty that this was the judgment which the defendant in error, Trail, intended to stay.

Judgment reversed, and cause remanded.

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1. **SEDUCTION. Evidence. Statute of limitations.** On a trial for seduction, evidence of a criminal connexion between the daughter and defendant, is not limited to the period of three years from the commencement of the suit. The whole of the party's intercourse with the person seduced, and all the circumstances of the case are to be regarded as an entire transaction, and are admissible as evidence, as well in view of the question, whether the defendant is the father of the child, as to show the extent of the injury in aggravation of the damages.
2. **SAME. Same. Character of the person seduced.** Evidence of the general character of the person seduced is admissible, but this inquiry must be restricted to her general reputation as to chastity at the time of, and prior to her seduction.
3. **SAME. Same. Plaintiff's character.** When the father sues for the seduction of his daughter, it may be shown that he is a man of profligate character and dissolute habits. This, however, must be done by evidence of his general reputation, and not by proof of particular instances.
4. **SAME. Same. Character of the plaintiff's family.** The reputation of a particular member of the plaintiff's family, other than the plaintiff or the person seduced, cannot be inquired into; but the general reputation and standing of the family may be shown by the plaintiff with a view to enhance, or by the defendant to diminish the damages.

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5. *NEW TRIAL. Practice. Examination of witness after commencement of the argument.* After the evidence is closed and two arguments made on each side, the admission of a material witness is, perhaps, an exercise of discretion, scarcely to be vindicated by the most liberal practice; and if, on a motion for a new trial, disclosures are made materially affecting the credibility of such witness, and the verdict is excessive, it should be set aside and a new trial granted.

FROM SUMNER.

This cause was tried at the October Term, 1858, before TURNER, J. A motion for a new trial having been overruled, the defendant appealed.

SMITH, WINCHESTER, BATE, and SOLOMON, for the plaintiff in error.

HEAD and TURNER, for the plaintiff in error.

1. The Court was requested to charge, "that as the statute of limitations was pleaded, the jury could not look to any evidence of seduction or illicit intercourse by the defendant with the daughter, prior to three years next before the bringing of the suit, in aggravation of damages." The Court refused so to charge; and stated to the jury upon this plea, that if they "shall find that there was adulterous intercourse obtaining between the defendant and Latitia Clendening, running through a space of more than three years, then the whole space of time may be looked to, not only as evidence for the purpose of ascertaining whether the defendant was the father of the child, but also may be looked to for the purpose of aggravating the damages."

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Seduction is the "crime of persuading a female, by flattery or deception, to surrender her chastity." Criminal connection may take place without seduction; and if seduction be not proved, damages for it should not be given. Sedgwick on Dam., 543; *Hill v. Wilson*, 8 Blackford, 123. If the seduction took place more than three years before the suit was brought it certainly could not be looked to in fixing the measure of damages. If this were so the statute would afford no protection. The loss of service is the *gravaman* of the action, but the seduction the real cause. If the seduction occurred more than three years before the suit was brought, it certainly is not admissible in aggravation of the damages.

2. The Court refused to permit evidence of the general bad character of the daughter of the defendant in error, after the time she stated she was seduced by the plaintiff in error, which was four years before her pregnancy.

The Court was requested to charge, that if the daughter of the defendant in error was a lewd woman. at the time of the debauchery, the plaintiff was only entitled to recover for the actual loss of service and expenses; and that the jury could not look to the loss of character, and injured feelings of the plaintiff's family. The Court refused so to charge; but stated to the jury, that if "it should appear from the testimony, that the defendant was responsible for the loss of chastity; and in consequence of the defendant's conduct she became lost and abandoned, and had adulterous intercourse with other men, it would not be entitled to any or but little weight in ascertaining the damages; and this is so, for the reason

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that it may be a consequence of the seduction committed by the defendant, if any was committed by him."

The principle established by the ruling of the Court is, that the character of the daughter for chastity, after her alleged seduction, although four years before pregnancy, is not competent evidence, if the defendant sued, was guilty of the first criminal act with her. Her character for chastity up to the time of parturition is involved in the issue. 2 Greenleaf on Evidence, sec. 577. And unless the loss of character is the result of the seduction it is proper to go to the jury in estimating the damages.

If the daughter was a lewd woman at the time of the debauchery, the plaintiff below was only entitled to recover for the actual loss of service and expenses. *Fletcher v. Ranāll*, A. N. P., 196.

3. The Court below erred in permitting Dr. Meader and Peter M. House to be examined. The *rule* had been applied for and granted. Meader was examined after the testimony of the plaintiff had closed. He had not been under rule. House was permitted to be examined after all the counsel, except two, had concluded their argument. He had been summoned and discharged, and then examined. He had not been under rule. Although the relaxation of the rule is within the sound discretion of the Court we do not think sufficient cause was shown in this case, to admit his testimony, more especially as the *rule* had been asked for, and granted by the Court.

4. The plaintiff in error proposed to prove the profligate principles and dissolute habits of the defendant in error. It was objected to, and the objection sustained.

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The evidence is competent. 2 Greenleaf on Evidence, sec. 579; *Dodd v. Norris*, 3 Campb., 519. This evidence is also competent to show that the injury or consequence has, in part, resulted from the improper, negligent, and imprudent conduct of the plaintiff himself. 2 Stark. on Evidence, 6 American edition, 722.

5. The plaintiff in error proposed to prove that the general character, for chastity, of the wife of the defendant in error, and mother of the daughter, who is alleged to have been seduced, was bad. The Court ruled that the evidence was incompetent. Evidence of the general good conduct of the plaintiff's family; of their character, and the number of his other children, is admissible on the question of damages. And the jury may award compensation for the loss of his domestic peace, as well as the disgrace cast upon his family. 2 Stark. on Evidence, 6 American edition, 722; *Bedford v. Mackoul*, 3 Esp. C., 119; *McAuley v. Birkhead*, 13 Iredell's (N. C.) L., 28; *Kendrick v. McCrarey*, 11 Ga., 613; *Hill v. Wilson*, 8 Blackford, 123-4; *Haynes v. Sinclair*, 23 Vermont, 113; *Kemble v. Pillow*, 7 Monroe, 295; 3 Scam., 373. If such proof is competent on behalf of the plaintiff in the action, it certainly would be competent to show the general bad character of the family, in mitigation of the damages. It is competent on another ground, to show what anguish and sorrow the plaintiff would feel in the loss of the virtue of his daughter. If, as we proposed to show, the plaintiff below had been living with a prostitute for a number of years, keeping this daughter with her, he could not be very sensitive to her degradation. 2 Stark. on Evidence, 722.

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6. The plaintiff below was permitted to prove by his daughter, that medicine and a note were sent to her. That the medicine was sent to destroy her child, and she took one dose of it, but it did not hurt her. The note was permitted to be read. This evidence was objected to, and the objection overruled.

The Court was requested to instruct the jury, "that if they believed the defendant had sent medicine to the daughter to destroy her child, and she did not take it, so as to injure her and occasion a loss of service to the plaintiff, they should not look to this fact in making up their verdict upon the question of damages. That it could be looked to, alone, for the purpose of ascertaining whether the defendant was the father of the child. The Court refused so to charge. The rule of law is well settled, that, in cases of torts, it is necessary for the party complaining to show that the particular damages in respect to which he proceeds, are the legal and natural consequence of the wrongful act imputed to the defendant. Sedgwick on Damages, 82; *Clark v. Brown*, 18 Wendell, 213. In cases for seduction, any consequential damage not affecting the plaintiff, or which is remote, cannot be allowed. Such as the probable expense of supporting the illegitimate child; loss of service resulting from the illness of the daughter, which illness was occasioned by the desertion of the seducer; promise to marry the daughter, &c. Sedgwick on Damages, 82; *Haynes v. Sinclair*, 23 Vermont, 108; Sedgwick on Damages, 544; *Dodd v. Norris*, 3 Campb., 519; *Foster v. Scofield*, 1 R., 299. Upon what principle then can this evidence be looked to, in ascertaining the

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damages? Its competency for any purpose, is doubtful; but certainly it is incompetent in aggravation of the damages. It is a distinct and substantive matter, having no connection with the alleged seduction.

7. We insist, that the Court should have granted a new trial upon the affidavits of plaintiff in error, and those filed by him. House having been examined by the permission of the Court, at the time and under the circumstances it was done, his testimony must have had a controlling influence on the verdict of the jury. When the Court saw, by the affidavits, that he could have been discredited; and, in all probability, was the father of the child, we think a new trial should have been granted.

8. The verdict is excessive and a new trial should be granted for this cause. When the whole proof is looked to, there is nothing to warrant such a verdict. The proof shows that the daughter alleged to have been debauched, had, as far back as 1851, been guilty of acts of lewdness and criminal connection with various persons; that these acts of lewdness continued up to, about, the time she became pregnant.

GUILD, ALLEN, and BENNETT, for the defendant in error.*

MCKINNEY, J., delivered the opinion of the Court.

This was an action on the case brought by Clen-

*The briefs of the other counsel are not on file, or they would be inserted.

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dening for the seduction of his daughter. Verdict and judgment were rendered for the plaintiff, for \$7,500, and the case is brought here by an appeal in error.

It is alleged in behalf of the plaintiff in error, that in the progress of the trial various errors intervened in the admission and rejection of evidence, and in the determinations of the Court, in regard to the effect of the evidence, as also in the instructions given to the jury. But the chief error relied upon for the reversal of the judgment, is the refusal of the Court to grant a new trial for the cause disclosed in the affidavits produced after verdict.

The case is a peculiar one in all its circumstances. The plaintiff's daughter was examined as a witness on the trial. From her testimony it appears that Thompson, the defendant, was a married man, whose residence was within half a mile of the plaintiff's; that the families were intimate, and defendant was the family physician of plaintiff's family. That in the summer of 1854, while the witness was temporarily an inmate of defendant's family, an illicit intercourse commenced between the defendant and herself, which was continued up to the first of September, 1857—a period of more than three years—when she discovered that she had become pregnant; and on the 8th of June, 1858, was delivered of a child, of which defendant was the father. She further stated that, upon informing the defendant of her condition, he proposed to give her \$100 if she would swear the child to one Peter M. House, who had been visiting her as a suitor; and on her refusal to do so, he proposed that she should take some chemical preparation to destroy the child, and afterwards sent her a liquid

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preparation in a phial, designed to produce an abortion, accompanied with a note urging her to take it, as she would not swear the child to House. That she took one dose and it made her so sick she threw the rest away.

Numerous witnesses were examined on both sides as to the general character of plaintiff's daughter for truth and chastity. The witnesses for the plaintiff seem to have heard nothing prejudicial to her reputation previous to her criminal intercourse with the defendant. But some of the witnesses on the other side state, that, before the summer of 1854, the time when it is alleged her intercourse with the defendant commenced, her general reputation for chastity was bad.

One witness (George Sarver) states, that, at a camp-meeting, in 1853, he had sexual intercourse with her, at her own solicitation. Other witnesses detail instances of indelicacy of behavior on her part, and of liberties with her person by young men, tolerated by her, utterly revolting to female delicacy and decency.

This much of the evidence in relation to the conduct and character of the defendant, and the person seduced, it has been thought proper to state, in view of the question of damages hereafter to be noticed.

1. It is insisted that the Court erred in admitting any evidence of a criminal connection between the defendant and the plaintiff's daughter beyond the period of three years from the commencement of the present action.

We do not think so. The whole of the defendant's intercourse with the person seduced, and all the circumstances of the case, are to be regarded as an entire transaction, and are admissible as evidence to the jury,

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as well in view of the question whether the defendant is the father of the child, as to show the extent of the injury in aggravation of the damages.

2. The Court refused to admit evidence of the general bad character of the plaintiff's daughter after her seduction. In this, we think, the Court did not err. It is true that the general character of the person seduced, for chastity, is involved in the issue; and if bad, the defendant may avail himself of it in mitigation of the damages. But this inquiry must be restricted to her general reputation as to chastity at the time of, or before her seduction. The necessary result of her seduction would be the ruin of her reputation in the public estimation; and it would be monstrous to hold that the defendant might avail himself of that ruined reputation, caused by his own wrong, to lessen the claim of her injured parent to damages. The proposition is too revolting to our reason and sense of justice to admit of discussion.

3. The defendant proposed to prove, on cross-examination of the plaintiff's daughter, that she had heard her mother charge her father, the plaintiff, with adultery, and that he admitted the charge to be true. The Court properly excluded this evidence. We have recently held, in *Reed v. Williams*, that it is admissible to show that the plaintiff is a man of profligate character and dissolute habits; but that it must be done by evidence of his general reputation, and not of particular instances.

4. The defendant also proposed to prove that the general reputation of the plaintiff's wife, and mother of the person seduced, as to chastity, was bad. This evidence the Court also properly rejected. The general

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reputation and standing of the family may be shown by the plaintiff, as it seems, with a view to enhance the damages; and, upon the same principle, it would seem that such evidence ought to be admitted on the part of the defendant to diminish the damages. But the reputation of a particular member of the family, other than the plaintiff or the person seduced, cannot be inquired into.

5. The next and only remaining error which we deem it necessary to consider, is the refusal of the Court to grant a new trial.

It appears from the bill of exceptions, that after the examination had been closed on both sides, and after two arguments on each side had been made to the jury, an application was made to the Court on behalf of the plaintiff to examine Peter M. House as a witness, for the purpose, first, of discrediting George Sarver, a witness examined by the defendant, who proved that he had had sexual intercourse with plaintiff's daughter prior to her seduction by the defendant; and, in the next place to relieve himself from the imputation made upon him in the evidence and in the argument, of being the father of the child charged upon the defendant. The Court admitted said witness. And he stated, in substance, that in July or August, 1858, Sarver had stated, in a conversation with witness, "that he never had criminal connection with plaintiff's daughter, and that he would lay his hand on the Bible and swear it." Witness likewise stated that he himself never had sexual intercourse with her. But, on cross-examination, he admitted that he had visited her as a suitor, and that he had taken various liberties with her person, which need

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not be here stated. He likewise stated that he had been summoned as a witness for plaintiff, but had got off from attending and had gone to the country, and returned again to the court house during the progress of the argument.

After the examination of House the Court offered to postpone the trial as long as might be necessary to afford the defendant opportunity to produce witnesses to rebut the testimony of House. But the defendant's counsel waived the offer, and consented to proceed with the trial, upon its being admitted by plaintiff's counsel that Sarver could prove a good character—defendant's counsel admitting, at the same time, that House could also prove a good character. It should have been remarked that the defendant was absent. He left town after the evidence was closed and went to the country to visit his wife, who was sick, as he alleged, and did not return until after the verdict was rendered.

The defendant produced the affidavits of several persons, setting forth the repeated and positive declarations of House to the effect that he had had criminal connection with the plaintiff's daughter for a period of twelve or eighteen months; that she was with child by him, and that he expected he would have to leave the country on that account; and that he had offered her a sum of money to swear the child to the defendant, Thompson. Other matters stated in the affidavits we deem unnecessary to notice. We likewise pass by, without notice, the counter affidavits produced by the plaintiff.

The difficulty in the way of holding the Circuit Judge to have erred in refusing a new trial upon the

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foregoing facts, grows out of the refusal of the defendant's counsel to accept the offer, so fairly and properly made by the Court, to give time to introduce rebutting evidence.

In ordinary cases, perhaps, a party ought to be concluded by such an act of his counsel in his absence, however rash or unadvised it may have been on the part of counsel. But under the extraordinary circumstances of this particular case, we think the defendant should not be denied a new trial on that ground. The counsel swears that he was wholly ignorant that any rebutting evidence could be produced. And the defendant can scarcely be charged with negligence in being absent, as it was not reasonably to have been expected that, after the close of the evidence and after the argument was nearly concluded, new testimony would have been admitted; and especially the testimony of a witness who had been summoned by the plaintiff, and discharged without examination. And we cannot forbear to remark, that the admission of this witness, under all the circumstances, was perhaps an exercise of discretion scarcely to be vindicated by the most liberal practice. But granting that he was properly admitted, when we look to the time and circumstances of his admission, the purposes for which he was introduced, the great importance of his testimony, if credited by the jury, as it must have been from the verdict, the very questionable attitude occupied by him from his own admissions on cross-examination, and, still more, the force of the affidavits to destroy his claims to credit altogether, we feel constrained to say that the Court erred in refusing a new trial. And we arrive at this conclusion the more

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readily, perhaps, because we think the damages are excessive, to a most unreasonable and extravagant degree. Whether upon this ground alone, we should feel warranted in setting aside the verdict, is a question not necessary to be considered. We are not by any means inclined to discourage exemplary damages in cases of this kind, wherever a proper case for such damages is made out. But it will not do to permit juries to place all females upon the same common level, and to lose sight of all those just distinctions, founded upon the conduct, character, and social position of the parties, in view of which the damages, in each particular case, ought to be estimated.

The case before us, so far as the plaintiff and his daughter are concerned, is certainly not a very proper one for unusual damages. But the aggravations and enormities of the defendant's conduct deserved to be marked by the jury. Nevertheless, we think the damages were altogether disproportioned to the whole case.

Judgment reversed.

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1. WILL. *Construction.* The words, "lawful heirs of his body," in the following clause, to-wit: "To my son, Lodwick Vaden, I *lend* two negroes, Lucy and Harry, and increase, during natural life, and at his death, to be equally divided between the lawful heirs of his body," are words of purchase, and means children. Lodwick Vaden, therefore, took only a life estate in said slaves—remainder to his children.

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2. **ADVANCEMENTS.** *Notes held by the intestate. Case in judgment.* Notes held by the father at the time of his death, against a son, are not to be charged as advancement, unless it be proved that they were used merely as evidences of a gift or advancements to the son, or that the father did not intend to collect them. The intestate held several notes on an insolvent son. The son died before the father, leaving children. The notes came to the hands of the administrator without any evidence explaining the intention of the intestate, as to whether he held them as debts, or intended them as gifts to his son. Held, that *prima facie* they are debts, and cannot be charged as advancements, in the absence of proof showing that the deceased did not intend to collect them, or regarded them as gifts to his son.

FROM SMITH.

This bill was filed by the administrator of Lodwick Vaden, for a construction of the will of his father, William Vaden, and for a collation of advancements. There were sundry notes in the possession of Lodwick Vaden, at his death, against his son, S. T. Vaden, who was insolvent, and died before the death of his father. No proof was introduced explaining the intention of the intestate as to said notes. Chancellor RIDLEY held, that Lodwick Vaden took only a life estate in the slaves, under his father's will, with remainder to his children. He also held, that the notes should be charged against the distributees of S. T. Vaden, as advancements to their father.

S. M. FITE, for the complainant, said :

There are only two questions raised: 1st. Did Lodwick Vaden take an estate for life, or an absolute one in the slaves Lucy and Harry, under the following clause

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of the will of his father, William Vaden: "To my son, Lodwick Vaden, I *lend* two slaves, Lucy and Harry, and increase, during natural life, and at his death, to be equally divided between the lawful heirs of his body." That Lodwick Vaden took only a life estate, remainder to his children; see *Loving and others v. Hunter*, 8 Yer., 4.

2d. The question as to whether certain notes executed by S. T. Vaden, a son of the complainant's intestate, who died before his father, shall be held to be advancements and charged in distributing to his, said S. T. Vaden's children. The Chancellor decreed that said notes should be held to be advancements, and we think correctly; otherwise, a child might be advanced to the full amount of a share, and then die, and his children come in for another share. The taking of notes for the money advanced was merely done to have evidence of the advancement at his death. The furnishing this money at intervals and holding up the notes, and making no effort to collect them, is conclusive, that they were intended as advancements and not as debts against the son. That money paid by a father for a son, is an advancement, and may be so held against the children of the son in case the son die; see *Carter's, Ex'r, v. Catling*, 5 Mur., 223. Much more would money loaned to the son, be held an advancement.

J. B. MOORES, for the defendants, argued:

1. The notes are from the father to the grand-

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father, the father having died many years before the grandfather, could not be charged against the grandchildren in distributing the estate of the grandfather under the laws of descent and distribution, both having died *intestate*.

There is no evidence of an intention on the part of the deceased to hold these notes as an advancement, or that it was not his intention to collect them. They remained in his possession as debts against the son.

2. The will of William Vaden, if valid for any purpose, vests in Lodwick Vaden an absolute estate in the slaves Lucy and Harry. The provision is within the rule in Shelly's case.

The word "heirs," is a word of limitation, and so held by the authorities. 4 Kent's Com., 228, 229 and 230; *Randolph v. Wendell*, 4 Sneed, 646.

WRIGHT, J., delivered the opinion of the Court.

The first question is as to the construction of the following clause in the will of William Vaden, senior, namely: "To my son, Lodwick Vaden, I lend two negroes, Lucy and Harry, and increase, during natural life, and at his death, to be equally divided between the lawful heirs of his body."

We are of opinion that the words "lawful heirs of his body," as used in this will, are words of purchase, and meant children. Lodwick Vaden, therefore, only took an estate for life in these slaves, with remainder to his children. The cases of *Loving et al. v. Hunter*,

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8 Yer., 4, and *Settle v. Settle*, 10 Hum., 474, are direct authority and decisive of the question. The Chancellor so held, and in this respect, we affirm his decree.

The next question is as to the various notes, or bonds, held by Lodwick Vaden, the intestate, at his death, upon his son Samuel T. Vaden; are they to be regarded as debts, or advancements, in the distribution of his estate? If the former, then they are not to be brought into hotchpot by the children of Samuel T. Vaden. If the latter, they must. *Proud v. Turner*, 2 Piere Williams, 561. These notes are four in number, all under seal, and made payable by the said Samuel T. Vaden to said Lodwick. Two of them bear date in September, 1847, one in 1850, and one in 1853, and were retained by the *intestate* till his death in 1856, and the same are now in possession of his administrator. Samuel T. Vaden had died before his father, and, it is said, was insolvent. There is no evidence explaining the intention of the father as to these debts, other than the notes themselves. Nothing to show that they were used merely as the evidences of gifts or advancements to the son, or that the father did not intend to collect them. As before stated, the case rests alone on the notes. To show that they are advancements, and to be so regarded, we have been referred to *Gilbert v. Wetherill*, 1 Cond. Eng. Ch. Rep., 444. But in that case it was made manifest by the evidence, that the father did not intend to collect the note. He burnt it and, in effect, declared his son was not to pay it; and the case had many other facts tending to show a purpose not to keep it as a *debt*.

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The fact here, that the *intestate* had several notes, taken at different times, and that he seems not, so far as we can see, to have pressed Samuel T. Vaden for their payment, can, as we think, furnish no evidence of an intention to make them gifts. He was his son, and insolvent, and he might very well indulge him. And if they were not *debts*, but *gifts*, why did he take or hold the notes at all. In the absence of proof to that effect, we have been unable to find any authority that these notes are to be regarded as advancements. We think that, *prima facie*, they must be treated as debts.

The decree of the Chancellor, as to this branch of the case, is reversed and the cause remanded; and if desired, evidence may be taken as to the purpose of the *intestate* in regard to these notes.

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1. TRUST AND TRUSTEE. *Effect of a purchase, by the trustee, with the trust fund.* Where the trustee purchases an estate with the trust fund, the *cestui que trust* is entitled to the benefit of the purchase; and is not restricted to a mere *equitable lien* upon the estate for the money advanced. The right of the *cestui que trust* becomes one of *ownership* of the land, and not one of *lien* upon it for the money paid by the trustee.
2. SAME. *Husband and wife. Trust fund used by the husband.* If the husband becomes the debtor of the wife by the use of the trust fund secured to her, and with his own means purchase and have conveyed to her *separate use*, property, or erect improvements upon her real estate, in payment of what he owed her, a creditor of his cannot question the validity of such conveyance, or subject said improvements to

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the payment of his debt. In such case the wife's equity is superior to that of the creditors of the husband.

3. IMPROVEMENTS. *Made upon the wife's real estate.* If the husband, voluntarily and without consideration, makes improvements upon the wife's real estate, they cannot be reached by his creditors for the payment of their debts.

FROM DAVIDSON.

This cause was tried before FRIERSON, Chancellor, at the May Term, 1858. The Chancellor decreed for the complainant, Georgetta C. Wilkinson, except as to the proceeds of the negro man. The complainants in the cross-bill appealed.

MEIGS and BRADFORD, for Mrs. Wilkinson.

EWING and COOPER, for the creditors.

WRIGHT, J., delivered the opinion of the Court.

This is a contest between Georgetta C. Wilkinson, wife of William H. Wilkinson, and his creditors, as to certain property in which she claims to have a separate estate, and denies its liability for his debts.

These creditors have obtained judgments against him, and have caused levies to be made upon this property, and seek to sell it as his estate. She has obtained an injunction to restrain them from its sale; and they, on the other hand, have filed bills to subject it to sale for the payment of the debts so due them.

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The property in controversy is a parcel of land in South Nashville, on Cherry street, fronting on that street $88\frac{1}{2}$ feet, and running back 165.

Forty feet of it was bought from Robert Henderson and conveyed by Isaac Paul, from whom Henderson had bought, on the 26th of November, 1849, to John M. Wilkinson, the consideration being \$700.

Ten feet was bought from Elisha Hall about the year 1852, for \$200, and thirty-seven feet from the same in the spring—say April, 1854—for \$800. And one and a half foot was bought from Charles F. Wright, and cost \$30.

The Chancellor decreed in favor of Mrs. Wilkinson, and held that the creditors could have no valid claim upon this property, it being her sole and separate estate.

In this decree we concur. It is shown in this record, beyond all dispute, that she became the owner of a valuable estate in slaves and money, under a deed of gift from John Bosley, her grandfather, and under his will; and that this estate was, by a decree of the Chancery Court at Nashville, in the year 1847, settled upon her, to her sole and separate use for life, with remainder to her children.

In this decree the said John M. Wilkinson, who was the father of the said William H., was appointed the trustee of the said estate, to hold and manage the same for the benefit of Mrs. Wilkinson and her children.

As to the forty feet bought of Henderson, we have no doubt whatever that it was purchased by John M. Wilkinson, the trustee, for Mrs. Wilkinson, and paid for out of the trust fund.

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He is shown to have had no means of his own, and could not have paid for it otherwise than out of the trust estate.

But we are not left to rely upon his want of means. That he had in his hands money of the trust estate sufficient to pay for it is clearly proved, and that he so applied it he frequently declared to many witnesses, and that the purchase was made for her. He even went so far as to mention the source from which the money had come, namely, from Mr. Bosley. And in his last illness called persons to bear witness that the lot was hers; that he had purchased it with her money; and though the deed was taken to him, yet it should have been to her, and he always so intended, but that his son had drawn the deed contrary to his wishes; that if he lived the title should be put in the proper parties, and if he died, they were to be witnesses of her rights.

He died in 1854; and all this took place before the contest with the creditors, and, as we believe, before their debts existed.

As to this forty feet, it is not pretended that William H. Wilkinson paid for it; but only that he acquired it by inheritance from his father. But the declarations of his father, unexplained, are conclusive against him and against his creditors, who, in this case, stand on no better ground than he does.

As to the residue of the 88½ feet, the weight of the proof is that it was paid for out of her separate estate. William H. Wilkinson so declared before this contest with his creditors; and this is evidence against him and them. Besides, we think, he also had no means where-

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with to make the purchase. But as to most of the purchase money we have higher evidence.

It is shown, by the most unquestionable testimony, that Mrs. Bosley, the grandmother of Mrs. Wilkinson, in the fall of the year 1853, in a division of a large sum of money among her children and grandchildren, gave to her, to her sole and separate use a note on Mark Cockrill for \$1,000, which was sold, and \$870 realized from it; and that with a part of the proceeds, three notes or claims on Lucas, Allen, and Long, amounting to \$578.50, were purchased and paid to Elisha Hall, in discharge of so much of the purchase money of the thirty-seven feet. And, as before stated, Wm. H. Wilkinson declared that the entire payment of the property had been made with his wife's money and means. The annual hires of her slaves are proved to have been near \$500—most of which, we are satisfied he received and used for many years.

It is true the bonds for title from Hall were taken to him, but the deeds were to his wife, for her sole and separate use, he, at the time, declaring it to be her property. And we think she has shown, to our reasonable satisfaction, that the entire estate was purchased with her means.

If there was any doubt in tracing her funds into this property, it could only be as to a part of the purchase from Hall. And, as to this, if her husband had become her debtor by the use of the trust estate, as we are satisfied he had, and chose, with his own means, to purchase and have conveyed to her separate use property in payment of what he owed her, we apprehend no creditor of his could be heard to complain.

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As to the improvements erected upon this property, they were made upon the forty feet, a piece of ground, beyond doubt, in equity, the estate of the wife, and cost from \$1,000 to \$1,500.

It is not necessary for us to state the effect of improvements made by the husband, voluntarily and without consideration, upon the wife's real estate, and whether his creditors would, in such a case have a remedy. *Ewing v. Cantrell*, Meigs' Rep., 364; 5 Hum., 417.

It is enough for us to say here, that we are of opinion from the facts in this record, that these improvements were also paid for with the means of the wife. And that if they were not, the husband being, as we are compelled to believe, largely her debtor because of his having used her trust property, might lawfully make them with his own means in discharge of what he owed his wife, and no creditors of his could be heard to complain.

In such a case the wife's equity is superior to that of the creditors.

We do not find about this transaction such marks of fraud or suspicion as make it inequitable for Mrs. Wilkinson to hold this property, or to induce us to let it stand merely as a security for her advances.

We understand the doctrine to be, that where the trustee, with the trust money, whether he be authorized to do so or not, purchases an estate, even in his own name, intending to hold it for himself, the parties entitled to the money may have the benefit of the purchase, and are not restricted to a mere equitable lien upon the estate for the money advanced. And that a

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fortiori is this so where the purchase is made directly for the benefit of the *cestui que trust*, and so intended by both the parties. The right of the *cestui que trust* becomes one of *ownership* of the land, and not of lien upon it for the advances. Notes in *Dyer v. Dyer*, 1 Leading Cases in Equity, 178.

Decree affirmed.

NANCY R. CRITTENDEN v. THOMAS POSEY.

1. SLAVES. *Dower in, under the law of Virginia. Forfeiture by removal.* By the law of Virginia, a widow has a right to dower in the slaves of her husband. If she remove the slaves of which she is thus endowed, from the State, without or against the consent of those entitled to the reversionary interest, she forfeits her life estate in them. But, the consent of the husband of a reversionary *feme covert*, is her consent, and will save the forfeiture.
2. SAME. *Husband and wife. Assignment of wife's reversionary interest in slaves. Law of Virginia and Tennessee.* No assignment, by the husband, of the wife's reversionary interest in slaves, though it be vested, and though the assignment be for a valuable consideration, will defeat her right of survivorship, if he die in her lifetime and while such interest is reversionary. The rule of law is the same, both in Virginia and Tennessee.
3. SAME. *Same. Same. Fraud of the wife.* If it be shown, affirmatively, that the wife fraudulently induced the purchase of the slaves, she would be *estopped* from asserting her right to them.
4. SAME. *Measure of damages on breach of warranty of title.* The measure of damages in a suit for a breach of a covenant of warranty of title in the sale of a slave, is the consideration money and interest.
5. SAME. *Same. Interest not computed while title good.* Where the title is good for a certain period, interest is not to be computed until the termination of the time for which the title is good. Thus, if an absolute estate in a slave is conveyed by a person having only an

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estate *pur autre vie*, the title being good for a certain period, the vendee is entitled to the consideration paid, with interest, *only*, from the termination of the life estate thus held by the vendor.

6. **QUESTION RESERVED.** How far the existence of fraud on either side, would affect the question as to the measure of damages, does not, properly, arise, and is not decided.

FROM WILSON.

The original bill was filed by the complainant to recover certain slaves claimed by her under the law of Virginia. The defendant filed a cross-bill against the representative of her husband's estate, to recover the value of said slaves, in the event she succeeded in her suit. Posey purchased the slaves of the husband of complainant, who warranted the title to be good. The cause was heard at the July Term, 1858, RIDLEY, Chancellor, presiding, who pronounced a decree for the complainant on her original bill; and for the complainant in the cross-bill for the value of the negroes. Posey, and the representative of the estate of Pryor Crittenden, both appealed.

ROBERT HATTON, for Nancy R. Crittenden, and the representative.

E. J. GOLLADAY, on the same side, said :

Upon this record two questions of law are presented for the judgment of this Court.

1st. Whether the sale of Pryor Crittenden, in his lifetime, of the slaves to defendant Posey, operates to

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defeat the reversion of the complainant, Nancy R., who survives her husband; and—

2. What is the measure of damages upon a breach of warranty of title in the sale of chattel property. Under the laws of Virginia, at the death of John Jackson, his widow, Francis, took one-third of the land and slaves for natural life, reversion to Nancy R. This creation by operation of law, of a life and reversion interest, clothes the property with all the qualities incident to such estates, when created by deed, will, or other writing. The purchase of the life estate of Fannie Jackson, the dower tenant, by Pryor Crittenden, did not produce a *merger* of estates, and thus entitle him to the absolute property, defeating the reversion of his wife. Before the husband can become entitled to his wife's reversionary interests, the life estate must determine, and a reduction into possession obtain. In the case at bar, the husband died before the life-tenant, and he was never capable of reducing the reversion into possession.

Whatever character of title was impressed upon the slaves by the Virginia laws, was continued by operation of Tennessee law, and the disposition of the property in Tennessee would be governed by the law of this forum.

The doctrine of the Tennessee Courts we understand to be, that no consolidation can take place of a life and reversion interest, by purchase of one or the other, and we lay down the rule of law, that a husband cannot convey and dispose of a wife's choses in action, reversionary, remainder, or equitable estates, so as to defeat the wife's right of survivorship. A reduction into possession, or a clear right and power of reduction must

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exist. The event must take place upon which a reduction can be had. *Caplinger v. Sullivan*, 2 Hum., 548; *Bugg v. Franklin*, 4 Sneed, 142. For the English books upon this question, see *Hutchins v. Smith*, 9 Sim., 187; *Ellison v. Elwin*, 13 Sim., 809; *Stamper v. Barker*, 5 Madd., 157, and the well considered case of *Horner v. Morton*, 3 Con. Eng. Ch. Rep., 298, where the cases are reviewed and passed upon. The modern cases of England hold that, if a woman having the reversionary interest in personalty, obtain an assignment of the interest of every other person, she will not thereby convert her reversionary interest into an interest in possession, or enable her husband to do indirectly what he could not do directly, assign her original interest so as to bar her right of survivorship. *Whittle v. Henning*, 2 Ph., 11 Bea., 222.

Bell on Property, page 79, sums up the result of the cases thus: the cases establish this general principle, that as to the wife's choses in action, whether presently recoverable, contingent or reversionary, the right of the husband, and of his assignee, are both subject to the same condition for their perfection, viz., reduction of the chose into actual possession during the life of the husband, if the wife survive him; that in this way alone can the wife's right to take the chose upon the husband's death, be defeated; and that neither the husband's assignment by operation of law, as in bankruptcy or insolvency, nor his voluntary assignment, whether with or without consideration, makes any change in this respect, because of any express or presumed intention in the husband thereby, to exercise a right of property in the chose by transferring it to another, which might

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ground an argument for implied reduction into possession, since nothing short of actual reduction into possession, by the husband or his assignee, will defeat the widow's right of survivorship.

And so we apprehend the Virginia Courts think. *Moore v. Thornton*, 7 Grattan, 99; *Browning v. Headly*, 2 Rob., 370. The case of *Upshaw v. Upshaw*, 2 Hen. and Mun., 381, relied upon by defendant, decided in 1808, is certainly repudiated by the later decisions of Virginia, if the doctrine contended for was really laid down. The points established in that case, and which were directly in judgment, were these, that a husband can not devise such reversionary interest, and that there can be no claiming under and against the will. The dicta of TUCKER, J., was founded upon no authority, and no where occurs in the opinions of the other judges who presided. The true points in the case were, no doubt, properly decided.

In regard to the forfeiture contended for in this case, under the Virginia statute, the case of *Hester v. Jordan*, 2 Swan, 475, has settled the construction of a similar statute, in which it is said, such forfeitures are to be taken strictly, and that a husband is capable of giving the necessary consent, and this consent becomes matter of evicence, and may be implied. The object of such a statute, we apprehend, is the protection of reversionary interest, and it could never be used to destroy such estates. The construction contended for here, would operate the sacrifice of both life and reversionary interests; and we take the law to be, that a party is not bound to exact the forfeiture. If the reversioner here has

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not pressed her rights, a consent or waiver of forfeiture may safely be presumed. 8 Monroe, 420.

Upon the question of damages, the second part of our inquiry, the decree of the Court below, as we think, was wrong.

The measure of damages upon a breach of covenant for title in the sale of real estate, is now well settled to be the price paid and interest. 2 Mass., 433; 4 Mass., 108; 14 Pick., 128; 10 Wend., 83; Rawle on Cov., 70 and 74. In Tennessee: *Hopkins v. Yowell*, 5 Yer., 805; *Elliott v. Thompson*, 4 Hum., 99. In the case of *Stoals v. Ten Eyck*, 3 Carnes, 115, where the subject was ably considered, the reason and philosophy of the rule now elaborately argued; and Kent, Ch. J., lays down the rule, for the measure of damages in real and personal property, as the same. The illustrations put there, apply with the fullest force to the sale of slaves.

The point in argument has been adjudicated, as we conceive in *Curtis v. Hanaway*, 8 Esp. R. 83; *Lewis v. Peak*, 7 Taunton, and in 5 Wendell, page 535, where the Court say the measure of damages, in an action brought for a breach of implied warranty of title in the sale of a horse, is the price paid, the interest thereon, and the costs recovered.

The express question is decided in *Glover v. Hutson*, 2 McMullen, S. C., 109, and in *Ware v. Weatherall*, 2 McCord, 413, where the Court held, "where there has been a breach of the warranty of a slave, and the purchaser has been deprived of the paramount title, the measure of damages for the breach of such warranty, is the price paid for the slave." Such is the

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doctrine of the Alabama Court. *Rowland v. Shelton*, 25 Alabama, 217. The Courts of Kentucky hold the same doctrine. *Ellis v. Gorney*, 7 J. J. Marshall, 110; *Johnson v. Sevier*, 4 J. J. Mashall, 142. The case of *Garrett v. Gaines*, 6 Texas, 444, shows the doctrine in accordance with equitable principles.

And we insist a deduction should be made of the value of the life estate, from the recovery. Such is the rule in real estate causes. Only in proportion as the title fails should be the recovery. *Tanner v. Livingston*, 12 Wendell; *Thompson v. Hawkins*, 1 Dana, 305, and *Beaufland v. Keen*, 4 Casey, (Penn.,) Rep., 124.

The defendant has had the use and hire of the slaves, and the interest of the purchase money would be very inadequate hire.

He was fully advised of the title he was purchasing, and Mrs. C. refused to confirm the sale or make any conveyance.

JORDON STOKES, for Posey.

CARUTHERS, J., delivered the opinion of the Court.

On the 4th of July 1838, Pryor Crittenden sold to Thomas Posey two slaves, Martha and Eveline, for \$566.50, and made him a bill of sale in the ordinary form. These, with the child of Martha named Sam, are the objects of this suit. The vendor is dead, and his widow, the complainant, claims the slaves as tenant in remainder, under the laws of Virginia.

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John Jackson died intestate, in Virginia, about the beginning of the present century, leaving a widow, Francis Jackson, and the complainant, his only child, who married Pryor Crittenden. They came to this State and settled in Wilson county, about 1831 or 1832. By a proceeding in the Court of Nottoway county, Virginia, in 1803, there was assigned to the widow, among others, as her dower in the slaves, a negro woman named Bridget. The slaves in controversy are her issue. It seems that Crittenden mortgaged the remainder interest of his wife in these slaves to Worsham, in 1830, by whom they were bought under a decree for sale there, and afterwards, perhaps in 1835 or 6, redeemed, and the life estate of the widow purchased, and the slaves brought to this State by Crittenden; and the two in question sold to Posey at the time stated, 1838. It appears that the complainant objected to the sale at the time it was made, insisting upon her right at the death of her mother, which did not occur until after the filing of this bill, when an amended bill was filed. The original bill was filed in November, 1854, the said Pryor having died the year before.

1. By the law of Virginia the life estate is forfeited if the slaves are removed from the State without or against the consent of those entitled in reversion. But this case presents no difficulty on that ground as they were removed by the husband, and his consent would be that of his wife in this respect, and save the forfeiture. *Foster v. Jordan*, 2 Swan, 476. So her right, whatever it was, would not be affected by the removal, nor would the life estate be forfeited, but inure to the husband as purchaser; and at the termination of

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that by the death of the widow Jackson, the complainant's right to assert her title in reversion would accrue, unless something else has occurred to defeat it.

2. This, it is insisted is the case, by the sale of the slaves by the husband. And whether that can be done by the husband, so as to bind the wife, is the next question. It certainly cannot by the laws of this State, so as to exclude her right, if she survives her husband, as was decided in the case of *Ann Sullivan v. Samuel Caplinger*, 2 Hum., 548. In that case, as in this, the husband, had purchased in the life estate, and sold the whole to Caplinger. But it is contended that the law of Virginia is different, and that such a sale there would bind her rights. This becomes an important question in the case, because of the sale under the trust deed there, and perhaps the sale to Posey here. This question seems to have been the subject of some conflict of decision, or at least of judicial and professional opinion in Virginia. The whole subject is presented in the text and notes, 1 Lomax on Ex., 312. His conclusion as to the Virginia decisions, conforms to the law as settled in this State, and refers to the same authorities relied upon in *Sullivan v. Caplinger*. His conclusion is, that no assignment by the husband of his "wife's reversionary choses in action," and this is held by cases cited in the note to include reversionary interests in slaves, "though it be vested, and though the assignment be for a valuable consideration, will defeat her right of survivorship, if he die in her lifetime, and while such interest is reversionary." If the life estate had fallen in while the husband lived, his right to reduce the reversionary interest to possession, would inure to his assignee

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and defeat the wife's right by survivorship. But that is not this case. The purchase of the life estate does not help or strengthen the husband's right to the reversion. The two estates were as distinct as before. The husband could not, by that or any other mode, obtain power over that while it was reversionary. In this respect, there is no distinction between the laws of Virginia and Tennessee.

There is no such affirmative fraud on the part of the wife, by inducing the purchase by Posey, as to preclude her from the assertion of her right. The proof that she said a few days before the sale, under excitement, that these slaves should be sold, does not connect itself with this sale, as the testimony is clear by Col. Price and others, that she opposed it at the time it was made. We conclude that there is no legal obstacle in the way of her right to a decree for these slaves, as held by the Chancellor.

3. The next question is upon the measure of damages to be recovered by Posey from the estate of his vendor, on account of the breach of warranty of title. Whether this should be the purchase money and interest, or the value of the slaves at the time of recovery. The Chancellor allowed the latter, amounting to \$2200, and charged \$250 for the hire since the termination of the life estate by the death of Mrs. Jackson, in 1856.

In relation to land, this question has perplexed the Courts of the different States, but has been most generally settled as in Tennessee, that the true rule is, upon failure of title, that the measure of damages upon covenant of warranty, is the consideration and interest. 4 Hum., 101; 8 Hum., 658. In a suit upon covenants to

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convey the value of the land at the time it should have been conveyed, is the rule. But when the subject is slaves, or other personal property, we are not aware that any rule has been settled in this State, in any adjudicated case.

It would seem to be most convenient in practice to make the rule the same in breaches of warranty of title to slaves, as for land, on account of uniformity. In *Rowland v. Shelton*, 25 Alabama Rep., 220, it was so held. So, in South Carolina, in 2 McMullin's Rep., 109, and previously in *Nott & McCord*, 198. In that case it is said such is the common law rule, 199. We can see no sufficient reason for a distinction as to the measure of damages in the two kinds of property. Either rule would work hard in some cases. If the value at the time of recovery under a better title be adopted as the rule, it would work unjustly upon the purchaser in a case where the property had fallen one-half from the time of his purchase, or where the value had been much reduced by age or disease. And, it would be hard upon a *bona fide* vendor to be bound to pay five times the amount received by him, in consequence of a great increase in number or value at the time of the successful assertion of the superior title.

On the other hand, if the rule be, that the price paid with interest, be the measure, that will likewise be productive of hard cases in some instances. Upon the vendor, when the slaves by depreciation from change of times or other causes, at the time they are lost, are not worth half so much, and still he would have to pay the full amount received; and upon the vendee, in case of great enhancement of value, as in the present

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case. The same reasons, with nearly, if not quite equal force, exist, and have been urged, upon the same question in relation to land. In some instances, in both cases, either rule works with apparent, if not real injustice, but in general, it is, perhaps, the most just and equitable that can be adopted. Yet some fixed rule must exist, notwithstanding the variety in the results of its operation in the different cases to which it may apply in practice. These difficulties were felt in relation to real estate, and the books are full of conflicting reasoning, as well as decisions on that subject. The result has been, that each State has settled the rule as best comported with the views of their respective tribunals. And perhaps it has generally been made uniform in its application to real and personal property in the same State. And as our Courts have adopted the principle in application to land, that the price paid with interest, shall be the measure of damages, we think it most fit and proper, that the same rule should govern in actions upon covenants for the failure of title to slaves. How far the existence of fraud on either side would affect the question, we need not now consider, as we think it did not exist in this case, but that the vendor thought he was selling, and the vendee considered that he was buying a good title.

We hold, then, that the measure of damages upon covenants of warranty for failure of title to slaves, is the consideration money paid and interest, as in the case of land. But in a case where the title was good for a certain period, as in this case for the life of Mrs. Jackson, interest should not be counted until the termination of the life estate, by her death, in 1856.

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Before that time, no hire can be charged, and it would be inequitable to allow interest. Since that event, the title failed, and the right to hire on the one side, as well as interest on the other, accrues. Some cases are to be found, in which the consideration paid originally, was reduced in the proportion of the value of the life estate, for which the title was good, to the absolute estate, to which the warranty extended. But we are not prepared to adopt that principle, and allow the full consideration paid, as aforesaid.

The decree will be reversed, as to the rule of damages, and the decree for Posey, upon his cross-bill, will be only for his purchase money and interest from the death of the tenant for life; and the decree against him, will be for the slaves and the hire up to the time they are delivered to the complainant. The cost will be equally divided.

LINCOLN NICHOLAS v. J. D. WARD *et al.*

1. **FRAUDULENT CONVEYANCES.** *Voluntary to child or other person.* A voluntary conveyance to a child or relative, or even to a stranger, is good, if it be not, at the time, prejudicial to the rights of any other person, or in execution of any mediated scheme of future fraud or injury to other persons. Although the party may not have been indebted at the time of making the voluntary gift or conveyance, still, if it was made with any design of fraud or collusion, or injury to other persons in future, it will be void.
2. **SAME.** *Existing and subsequent creditors.* If the conveyance is made with the intention to defraud existing creditors, it will, in gen-

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eral, be held void as to subsequent creditors. But if there be no existing creditors, and if the conveyance is made *bona fide*, and under circumstances which repel any presumption of fraud, subsequent creditors cannot impeach it although it is voluntary.

8. *SAME. Same. Evidence.* A voluntary conveyance or settlement will be presumed fraudulent as against existing creditors. But, as to subsequent creditors, there is no such presumption, and fraud in *fact* must be established.

FROM WHITE.

This cause was heard at the March Term, 1858, before Chancellor VAN DYKE, who dismissed the bill. The defendant appealed.

DENTON and COLMS, for the complainant, cited and commented upon the Act of 1801, ch. 25, § 2; Act of 1715, ch. 38, § 8; 5 Hay., 228-9; 3 Yer., 343; 3 Hum., 118; 6 Hum., 215; 9 Hum., 561; 1 Yer., 1; 1 Hum., 496; 9 Hum., 9; Statute of 29 Charles 2, ch. 3, § 10.

J. W. McHENRY, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

This was an attachment bill, filed on the 16th of April, 1856. The complainant claims to be the creditor of defendant, Stephen Ward, who is a non-resident, and seeks satisfaction of his debt, of some seventy or eighty dollars, out of a tract of land of about fifty acres, lying in Putnam county. It appears that said land was conveyed on the 25th of January, 1847, by one Say

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lors to John D. Ward, (son of the defendant, Stephen,) who was then an infant of two or three years of age. The proof tends to establish that Stephen Ward paid for the land, and procured the conveyance to be made to his son. There are vague statements in the proof that Stephen Ward was indebted to several persons, beyond his ability to pay, at the time of the conveyance of the land to his son. These statements, however, go for nothing, as the proof fails to establish the existence of any particular debt at that time. The debts claimed to be due complainant, were not in existence until *five years* after the conveyance from Saylor to John D. Ward, and were not contracted with complainant, but purchased up by him from others.

If the conveyance from Saylor to John D. Ward be placed upon the same footing of a voluntary conveyance made by the father directly to his son, it does not by any means follow, as has been assumed, that it is inoperative, by the statute of frauds, against subsequent creditors, merely because it was voluntary. The statute does not discountenance a voluntary conveyance to a child or relative, or even to a stranger, if it be not, at the time, prejudicial to the rights of any other person, or in execution of any mediated scheme of future fraud or injury to other persons. It is true, that although the party may not have been indebted at the time of making the voluntary gift or conveyance, still, if it was made with any design of fraud or collusion, or injury to other persons in future, it would be void. It is likewise true, that if the conveyance is intentionally made to defraud existing creditors, it will, in general, be held void as to subsequent creditors.

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But if there be no existing creditors to be prejudiced by the conveyance, or if it appear to have been made *bona fide*, and under circumstances which clearly repel any presumption of fraudulent intention, it is difficult to perceive upon what sound principle a subsequent creditor can be let in to impeach the voluntary conveyance. As against *existing* creditors the principle is obviously just, that a voluntary settlement or conveyance will be presumed fraudulent. But as to *subsequent* creditors there is no such presumption, and fraud in *fact* must be established.

In the present case, notwithstanding the suspicions that may arise out of the transaction, there is not sufficient proof of indebtedness, or of intentional fraud, to entitle the complainant to relief.

Decree affirmed.

THOMAS LANCASTER v. V. H. ALLEN, GUARDIAN, &C.

1. TRUST AND TRUSTEE. *Guardian. Misapplication of money.* If a guardian or other trustee agree to do an act which in itself is a manifest breach of trust, and the party who concurs in the act has notice of the trust, neither party will be heard in a court of justice to insist upon the performance of such act.
2. SAME. *Same. Same. Case in judgment.* The defendant in error held a note on the plaintiff in error, as guardian, &c. He purchased a mule and some plank of the plaintiff in error, and agreed that it should go in satisfaction of said note; but subsequently refused to do so, and sued on the note. Held, that such an application of the ward's money would have been a wilful misapplication of the trust fund, and would have involved both parties in a direct breach of trust, and neither party can enforce the agreement.

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8. **QUESTION RESERVED.** The question as to whether, if the executory agreement had been actually carried into effect by applying the price of the plank and mule as a payment on the note, such payment, as against the guardian, would have been good or not, is not decided.

FROM SMITH.

This cause was tried before GARDENHIRE, J., at the November Term, 1858. The defendant appealed.

A. McLAIN, for the plaintiff in error.

S. M. FITE, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action of debt upon a bill single for \$180, executed by Lancaster to Allen on the first of January, 1854.

The note expresses on its face that the money was payable to Allen, as guardian of one John Allen, for the hire of four slaves, the property of the ward, for the year 1854.

The suit was commenced before a justice on the 5th of September, 1858, and was taken by appeal to the Circuit Court, where judgment was rendered in favor of the plaintiff for the full amount due upon the note, with interest.

On the trial it was proved that, in April, 1855, the defendant sold the plaintiff a quantity of plank, and that in the summer of 1857, he also sold him a mule, and that it was agreed between the plaintiff and defendant,

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at the time of the respective sales, that the price of the plank and mule was to be applied in payment of so much of the debt due upon the note for the hire of said negroes. The plaintiff failed to enter any credit on the note, and refused, on the trial, to abide the agreement.

His honor, the Circuit Judge, instructed the jury that the agreement was illegal, and could not be enforced. And the question is, did the Court err in this instruction? We think not. To have appropriated the money of the ward, in the hands of the defendant, to the payment of the individual debt of the plaintiff for the plank and mule purchased, for his own benefit, from the defendant, would have been a wilful misapplication of the trust fund, and would have involved both parties in a direct breach of trust. No argument is necessary to establish the proposition, that if a guardian, or other trustee, agree to do an act, which, in itself, is a manifest breach of trust, and the party who concurs in the act has notice of the trust, neither party will be heard in a court of justice to insist upon the performance of such act. Such an agreement is regarded as a fraud upon the rights of the beneficiary; and all who participate in it, knowingly, will be equally affected by it.

It is not necessary to discuss the question, whether, if the executory agreement had been actually carried into effect, by applying the price of the plank and mule as a payment on the note, such payment, as against the guardian, would have been good or not. The admission that it might have been operative, by way of estoppel upon the plaintiff, though invalid as against the ward, would not in the least degree militate against the

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proposition we have asserted, that, as an executory agreement, its performance cannot be enforced.

The judgment will be affirmed.

DAVID LEWIS v. THE STATE.

1. **CRIMINAL LAW. Pleading. Plea in abatement not favored.** A plea in abatement is not favored, and must be taken with great strictness.
2. **SAME. Same. Form of plea in abatement.** A plea in abatement to a presentment, should commence by praying judgment of the presentment, and conclude with a like prayer, and that said presentment be quashed. If it begin and conclude like a plea in bar, it is bad as a plea in abatement.
3. **SAME. Same. Replication.** To a plea in abatement setting forth that the defendant was indicted by the wrong name, a replication, alleging that the defendant is called and known by the name mentioned in the presentment, is good.
4. **SAME. Same. Demurrer reaches the first defect.** A demurrer reaches the first defect in pleading.
5. **SAME. Same. Respondeat ouster. Final judgment.** Upon sustaining a demurrer to a plea in abatement, the proper judgment is, that the defendant plead over; but if he refuse to do so, the Court may render final judgment against him.
6. **SAME. Same. Replication and issue filed in brief.** If the defendant plead in abatement, and the State replies, the words "*Replication and issue*," in brief, found in the record in the absence of evidence that they were intended as an issue upon the State's replication, will be treated as a nullity.

FROM WHITE.

The plaintiff in error was presented for *gaming*. He filed the following plea:

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"The defendant, in proper person, comes and defends the wrong and injury when, &c., and for plea, says *actio non*, because he says he is indicted by the name of David Lewis, when in fact his name is not now, nor never has been David Lewis, but his name now is, and ever has been, Davis Lewis, which he is ready to verify: Wherefore, he prays judgment, if he ought to be compelled to make any other or further defence to said indictment."

The Attorney General, W. C. PAYNE, replied, that the defendant was called and known by the name of David Lewis, as well as Davis Lewis.

The defendant filed a demurrer to the replication of the State.

At the September Term, 1858, the cause was heard upon the demurrer, when the presiding Judge, GARDENHIRE, sustained the demurrer to the defendant's plea; and, he refusing to answer over, rendered up final judgment against him. The defendant appealed.

T. B. MURRAY, for the plaintiff in error.

SNEED, Attorney General, for the State.

WRIGHT, J., delivered the opinion of the Court.

We perceive no error in the judgment of the Circuit Court in this cause, and affirm it.

The ground assumed for its reversal by the counsel of the plaintiff in error, if we understand it, is, that his plea in abatement to the presentment is good, and the Circuit Judge erred in holding it bad, upon his demurrer to the State's replication to the plea.

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The demurrer reached the first fault in pleading.

A plea in abatement is not favored, and must be taken with great strictness.

This plea is bad. It had neither the proper beginning or conclusion. It should have begun by praying judgment of the presentment, and have concluded with a like prayer, and that it be quashed. 1 Chitty's Cr. L., 448. *The King v. Shakspeare*, 10 East. 83. Instead of this, it began and concluded more like a plea in bar, and was, as we think, in other respects defective.

We also think the replication to the plea was good. 1 Chitty's Cr. L., 449. And in whatever way we take the judgment of the Circuit Court, whether as sustaining the demurrer to the plea, or as overruling it upon the replication, it contains no error of which the plaintiff can complain.

The proper judgment in such a case was, that defendant plead over, but having refused to do so, the Court did not err in rendering final judgment against him. 1 Chitty's Cr. L., 441-451; *The King v. Gibson*, 8 East, 107; 1 Chitty's Cr. L., 424 and 425; *Commonwealth v. Moore*, 9 Mass. 402.

The brief words, "Replication and issue," as found in this record, we cannot notice. We have no evidence that they were intended as an issue upon the State's replication. We infer directly the contrary from reading this record. We may treat them as nullities. *Webber v. Houston*, 6 Yer., 314; 4 Do., 565.

Judgment affirmed.

James W. Grissom v. L. B. & T. D. Fite.

JAMES W. GRISSOM v. L. B. & T. D. FITE.

1. PRACTICE. *Leave to file a defective plea refused.* It is not error in the Circuit Court to refuse leave, at the trial term, to file a defective plea.
2. PLEADING. *Non est factum.* A plea of *non est factum* filed by the accommodation endorser of a note, which was left to be filled up by the maker, should aver that the endorsee knew at the time he received the note, that the maker was not authorized to insert the amount with which the note was filled up. The law presumes the holder of the note to have purchased for value and in due course of trade, and he could enforce the collection of it, unless he had notice of the want of authority to fill it up with the amount inserted.

FROM SMITH.

At the trial term the plaintiff in error asked leave to file this plea:

"And the defendant, James W. Grissom, comes and defends the wrong and injury, when, &c., and for plea says, that at the time of endorsing, as security, the said promissory notes declared on, they were both blank as to the amount, and that sometime subsequent to the execution thereof by this defendant, and in his absence, and without his assent or authority, said blanks were filled up in one of said notes, by inserting the words, 'four hundred and fifty-three dollars and seventy-one cents,' and the other note was filled up, by inserting the words, 'four hundred and fifty-eight dollars and twenty-four cents,' without any acknowledgment or redelivery of said supposed promissory notes by this defendant.

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The defendant further avers, that at the time of endorsing said supposed promissory notes, as aforesaid, his co-defendant, Jas. A. Crutcher, was authorized to fill up the respective blanks in them as to the amount, so that both of said promissory notes together, should not exceed the sum of four or five hundred dollars; and in no event was this defendant to be bound as endorser thereof, for a greater amount than four hundred or five hundred dollars, altogether, on both of said supposed promissory notes. Both of which were afterwards filled up as to amounts, as aforesaid, without the consent or procurement of this defendant, and without his acknowledgment or re-delivery thereof. And this he is ready to verify," &c.

The Court, GARDENHIRE, J., presiding, refused the application. Judgment was rendered in favor of the plaintiff, at the November Term, 1858, and the defendant, Grissom, appealed.

W. H. DEWITT, for the plaintiff in error, cited and commented upon the following authorities:

12 Con. Eng. R., 285; 17 John. R., 301; 3 Pick. R., 5; 2 Green. on Ev., § 172, and authorities there cited; 2 Stark. on Ev., 220, and authorities there referred to; *Hall v. Hall*, 8 Conn. R., 336; *Bank of St. Albans v. Gilliland*, 23 Wen., 311; *Wheeler v. Guild*, 20 Pick., 545; 2 Kent's Com., 80 and 81; 9 Wen., 170; 10 Do., 85; 5 Pick., 223; 20 John. R.; 13 East's R., 185, note; *Grant v. Vaughan*, 3 Burr. R., 15 and 16; Story on Agency, §§ 14, 15, 29 and 34.

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S. M. FITE, for the defendants in error, said:

The plaintiff in error insists that there was error in the refusal of the Court to permit him to file a new plea at the trial term.

We say there was no error for two reasons:

1. There is no good reason given for not filing it at the first term.

2. The plea was bad, because, if true, it was no defence to the action.

The point in it is, simply, that the notes, when endorsed by him, were in blank as to amount, being executed and delivered by him to the maker, to be filled up with \$400 or \$500; and that Crutcher, the maker, for whose accommodation he endorsed, filled them with double that amount, and that this was done in the presence of defendants in error. But it does not aver that the defendants had any knowledge that the notes were being filled up with too large an amount. That this delivery of the notes in blank to be filled up by Crutcher, the maker, was a *carte blanche* to fill them with any amount, see *Nichol, Hill & Co. v. Bate*, 10 Yerg. 429; *Chitty on Bills*, 88, and note 1; *Chitty on Bills*, 186; *Putnam et al. v. Sullivan et al.*, 4 Mass., 45.

WRIGHT, J., delivered the opinion of the Court.

The pleadings in this cause were duly made up at the appearance term. At the trial term the defendant, Grissom, moved the Court for leave to file a plea of *non est factum*. This was refused by the Circuit Judge.

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In this there is no error. The plea was bad, because if true it was no defence to the action.

The plaintiffs were the holders of the two promissory notes in question, by endorsement from Grissom, and in legal presumption had purchased them for value, and in due course of trade. 2 Greenl. Ev. § 172.

It may very well be true that the notes were endorsed by him in blank, as to the amount, and delivered by him to Crutcher the maker, for whose accommodation they were made, to be filled up and used for a sum not exceeding \$500; and that he afterwards, in the absence and without the authority of Grissom, in the presence of the plaintiffs, caused the blanks to be filled in double that sum; yet if the plaintiffs were ignorant of his want of authority so to fill up and use said notes, and were *bona fide* holders, they would still be entitled to recover. The plea does not negative this, and the authorities are abundant to show it is defective. *Stuart v. Davidson et al.*, Peck, 202, 203; *Bank of the Commonwealth v. Curry*, 2 Dana's Rep., 142; *Kimbrow v. Lytle*, 10 Yer. 417.

It may be very true, as argued by the counsel of Grissom, that under a proper plea, if he were to show by proof the facts stated in this plea, the plaintiffs would then be required to show under what circumstances and for what value they became the holders. 2 Greenl. Ev. § 172.

Yet this is a question of evidence, and not of pleading; and it is still manifest the plea was defective.

Affirm the judgment.

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POLK, WILSON & Co. v. THOMAS H. FANCHER *et al.*

1. **SLAVES.** *Rule in fixing value. Evidence.* The owner of a slave, whose life has been unlawfully taken, is entitled to recover his market value, considering his age, appearance, health, and general traits of moral character; but evidence of an alleged crime, for which he has been committed to jail, but not tried, is inadmissible. The law presumes him innocent until his guilt is made to appear legally, and his value should be ascertained upon this legal presumption
2. **SAME.** *Exemplary damages.* In suits for injuries to personal property, the jury is not restricted to the pecuniary loss of the plaintiff if the case is one of wantonness and cruelty. In such cases the damages should be such as not only to compensate the plaintiff, but to operate as a punishment of the defendant, and an example to deter others from the commission of like offences.
3. **SAME.** *Same. Case in judgment.* A slave was charged with the crimes of *rape* and *murder*—was arrested and committed to jail to await his trial. The defendants broke open the jail, took the slave from the custody of the law, and hung him. Held, that it is a case of extraordinary aggravation, in which the law was set at defiance, public justice insulted, and the life of a human being, already in manacles, lawlessly taken, and calls for exemplary and vindictive damages; and evidence of said charges is not admissible in ascertaining the value of the slave.

FROM WHITE.

This cause was tried at the September Term, 1858, before McHENRY, special Judge, selected and agreed upon by the parties, the presiding Judge, GARDENHIRE, being incompetent. The jury returned a verdict for one cent damages, and the plaintiffs appealed.

M. M. BRIEN, for the plaintiffs.

T. B. MURRY and COLMS, for the defendants.

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CARUTHERS, J., delivered the opinion of the Court.

This was an action on the case, with one count in trover and another in case, brought against the defendants in White Circuit Court, to recover damages for killing their negro man slave, Austin. The verdict and judgment were in favor of the plaintiffs for *one cent* damages, and *they* bring up the case by appeal in error.

The Court permitted the defendants to prove the character of the slave to be bad, and to give their opinions that he was of no value on account of his infamy. Most of them stated that they had never seen or known him until he was apprehended for rape and murder, and put into the jail at Sparta; and in view of that charge hanging over him, they considered him worth nothing. Objections to all this evidence were overruled, and it was permitted to go to the jury. This, we think, was clearly erroneous. It is easy to see, in a case like this, what a powerful effect such proof would have upon the minds of a jury.

The case was one of extraordinary aggravation, in which all law was set at defiance, public justice insulted, and the life of a human being, already in manacles, lawlessly destroyed. He was charged with the shocking crimes of rape and murder combined. But the officers of justice had performed their duty, and had him safely incarcerated in jail to await the vengeance of the law, in case his guilt was established according to its forms. There was not the least necessity that the defendants should interfere after the criminal had been secured and disarmed of all power of resistance or of flight, and shed human blood, even of a slave, without

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trial or condemnation. If the slave was guilty of the crimes imputed, no punishment would have been too severe for him, and so by the law the penalty is death—death by hanging—the mode adopted by the defendants without and against law. But no man, whether bond or free, is to be condemned or punished without a hearing—a fair and impartial trial. There is neither valor nor patriotism in deeds like these. Not valor, because there is no contest—the victim is already in bonds and harmless; nor patriotism, because the country has provided for the proper and legal punishment of offenders, and needs not the aid of mobs and lawless combinations to wield the sword of justice or quicken its stroke. No matter how great the malefactor may be, whose life is thus taken without law, a feeling of alarm and insecurity pervades the whole community when one of these shocking deeds of violence is perpetrated. No man can tell what unfortunate concurrence of circumstances may raise the storm of popular fury against him, though he may be innocent, and bring speedy destruction upon him, if these examples are to be tolerated. All good citizens, every one who values his own safety, or has any regard for law and order, should unite in rebuking, in all proper modes, these outrages upon the lives of men and obstructions of the course of law and justice. The courts and juries, public officers and citizens, should set their faces like flint against popular outbreaks and mobs in all their forms.

This slave was well secured in jail to abide his trial and answer the demands of justice against him, even with his life. There was no chance for escape.

Some of the defendants by written agreement to

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stand by each other, and others without having signed it, moved by concert to the jail, broke down the door, took out the negro, and hung him till he was dead. It may be that he was guilty, but that was no good reason why others should bring the blood of murder upon themselves, by taking life without authority of law, and in contempt of public justice. If he were guilty of the enormous crimes charged against him, it was not then made manifest by a trial, and his guilt had not been established. The presumption of innocence can only be removed by proof upon a legal trial. It must be taken, then, for the purposes of this suit, that no crime had been committed by the victim of this wanton outrage. The jury should have been so instructed, and no proof of character, based upon this charge, should have been admitted. This would involve the necessity of trying the truth of all such charges to ascertain what weight should be given to the opinion. It is easy to see that this mode of ascertaining damages from the value of the slave, based upon character, with reference to the truth of the charge, would always make a case of nominal damages in cases of this kind. Witnesses would readily say, that as the slave was guilty of murder, and confined in jail to be hung for it, he was of no value. That is not the rule in such a case. His value should be determined from age, appearance, health, and, with all these, what he would sell for in the market; not what A, B, or C would give for him, or what he was worth if the charge were true. They recklessly slew him, and his guilt can never be legally made out. This misguided zeal to avenge the wrongs of others has deprived society of an example to deter evil men from

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crime, and presented an example of all others the most alarming to any well ordered community.

The general moral traits of character, as well as physical condition, would constitute elements in the estimation of value, but without reference to the accusation upon which he had not been tried, and as to which the law presumed his innocence until the contrary was made legally to appear. It was not for the defendants to adjudge that question, nor for witnesses to form and give their opinions as to his value upon the supposition of his guilt.

We think his honor also erred in holding that this was not a case in which the jury might go beyond the actual value, and give exemplary and vindictive damages. It was a deliberate, premeditated, and violent destruction of the plaintiff's property, in disregard of both the civil and criminal laws of the State, and of most evil example. It is just the kind of case in which the jury ought to have been allowed to vindicate the law by going beyond the value, and giving exemplary damages. In the case of *Johnson v. Perry*, 2 Hum., 569, where the action was, like this, for an injury to a slave, the Court says, "the jury may give *smart money* as a punishment for aggravated circumstances attending the wrong."

In *Tillotson v. Cheetham*, 3 J. R., 56-64, which was an action for beating a horse to death, it was held, that as it was a case of "wantonness and cruelty, the jury had a right to give *smart money*." This was the charge of the Circuit Judge, and the Supreme Court said it was correct, and that they would have been better satisfied with the verdict if it had been more *exemplary*. The Supreme Court of Connecticut (10

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Conn., 384) hold, that for injuries to personal property, "the jury is not restricted to the pecuniary loss of the plaintiff." These cases, and many others, are cited in Sedgwick on Damages, 454, 464. The reason of this rule is, that, in aggravated cases, the damages should be such as not only to remunerate or compensate the plaintiff, but to operate as a punishment of defendant, and an example to deter others from like offences. This principle is every where regarded as one of most salutary influence in the administration of justice, tending to prevent wrongs by the double operation of punishment and example.

The plaintiffs proved their title to this slave, and that he was killed by the defendants, and should have recovered his market value, at least. The verdict was a mockery of justice.

The judgment will be reversed, and a new trial granted.

SAMUEL SLAUGHTER v. GEO. W. BIRDWELL.

1. WITNESS. *Forfeiture against.* Act of 1794, ch. 1 § 29. By the act of 1794, ch. 1, § 29, a witness who is regularly summoned is bound to attend from term to term, until discharged by the Court, or the party at whose instance he may have been summoned, under the penalty prescribed, unless, on the return of the *scire facias*, sufficient cause be shown by the witness "of his incapacity to attend at the time and place mentioned in the subpoena." This incapacity must be a personal one, of the witness himself, and the sickness of his wife or other member of his family will not excuse him from attendance.

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2. QUESTION RESERVED. In the case of *Duke v. Given*, 4 Yer., 478, the "incapacity" contemplated by the act of 1794, is held to mean a physical incapacity of the witness. Whether or not this restricted sense of the term "incapacity" be warranted, does not arise in this case, and is not determined.

FROM JACKSON.

The demurrer to the plea of the defendant having been sustained by GOODALL, J, and judgment final rendered, the defendant appealed.

McHENRY and GARDENHIRE, for the plaintiff in error, said :

1st. The Court has no power after the adjournment of Court, or after the adjournment of the term, to make any addition to, or alteration of the record. *Clark v. Lary*, 3 Sneed, 81; *Staggs v. The State*, 3 Hum., page 372-5.

2d. The laws authorizing forfeitures against witnesses are highly penal, and must be strictly pursued. Great strictness is required, because experience proves that the original subject of litigation "may be lost sight of, or become an object of less interest than to secure] forfeitures against witnesses by one artifice or another." That the party summoning the witness may, in addition to the penalty, recover damages commensurate with the injury, "furnishes another reason for a high degree of strictness in the proceeding to recover the penalty." *Risdon Knott v. M. Smith*, 2 Sneed, 246; 3 Hum., 225; 11 Hum., 72.

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3d. In this case the judgment *nisi* does not assume the facts necessary to give the Court jurisdiction. It does not show when the witness was summoned, whether by subpoena issued in vacation, or *instante*. It must be seen from the judgment, that the defendant was summoned in compliance with the provisions of the act of 1838, ch. 131; (Nicholson's Sup., 232,) and that he has incurred liability by refusing to obey the process. The time of service and the time he was bound to appear, ought to be seen from the judgment. *Dickenson v. Kincaid*, 11 Hum., 72; *Risdon Knott v. M. Smith*, 2 Sneed, 246.

4th. The dangerous sickness of the witness' wife or family, is sufficient cause of his incapacity to attend. The witness is bound to make extraordinary efforts to attend. Nothing but extreme poverty, or sickness of himself or family, or high water, or the like, will excuse him. But he will be excused if he show that in failing to attend, he was guilty of no negligence or wilful disobedience of the process. *People v. Davis*, 15 Wend., 602; 3 United States Digest, 706; *Maclin v. Wilson*, 21 Ala. R., 670; 14 United States Digest, 603.

J. P. MURRAY, for the defendant in error, insisted that—

The only question that legitimately arises in this cause, is upon the pleadings. The plaintiff in error, Samuel Slaughter, relies, as his only defence in this cause, on the sickness of his wife, and pleads that as a de-

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fence in this suit, to which we demur. The Court below sustained the demurrer, and the plaintiff in error failing to make any other defence, the interlocutory judgment was made absolute. This action of the Court is sustained by a plain act of Assembly; see act of 1794, N. and C., 711, § 29. This act furnishes but two lawful excuses for the non-attendance of witnesses summoned in any cause: 1st. The discharge of the party summoning him. 2d. His physical incapacity to attend. N. and C., 712, § 29; Meig's Digest, 1047, where the causes decided by this Court are collected, on the above subject.

MCKINNEY, J., delivered the opinion of the Court.

At the November Term, 1855, of the Circuit Court of Jackson, judgment *nisi* was entered up against Slaughter for \$125.00, for his failure to attend, as he had been duly summoned to do, as a witness for the plaintiff, in the suit of *Birdwell v. Hall*, then pending, and for trial in said Court.

Scire facias was issued and served on Slaughter, on the return of which, he pleaded in substance, "that he was unable to attend, because of the illness of his wife, who was confined to her bed, and so ill, that his attention to her was absolutely necessary to her comfort and safety."

To this plea there was a demurrer, which, on argument, was sustained, and final judgment rendered against the defendant.

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There is proof in the record tending to impeach the truth of the plea. But we decline to notice it, as it was irregularly received, the judgment on the demurrer being decisive of the case.

By the act of 1794, ch. 1, sec. 29, a witness regularly summoned, is bound to attend from term to term, until discharged by the Court, or the party at whose instance he may have been summoned, under the penalty prescribed; unless, on the return of a *scire facias*, sufficient cause be shown by the witness, "of his incapacity to attend at the time and place mentioned in the subpoena."

In *Duke v. Given*, 4 Yer., 478, the "incapacity" contemplated by the statute, is held to mean a *physical* incapacity of the witness. Whether or not this restricted sense of the term "incapacity" be warranted, we need not now inquire. As we feel clear, that the facts alleged in the plea, do not constitute such an incapacity on the part of the witness to obey the command of the summons, as is contemplated by the act. The act obviously means that the incapacity, of whatever nature it may be held to be, must be a *personal* incapacity of the witness himself. This may seem to be a harsh requirement of the law; but, if so, the power to change it belongs not to the Courts. It must be remembered, however, that none others than a highly stringent law would be sufficient to enforce the attendance of witnesses in many cases.

Judgment affirmed.

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CAROLINE WADE v. CANTRELL AND TUBB, ADM'RS, &C

1. **SATAUTE OF LIMITATIONS.** *Adverse possession of the wife.* The adverse possession of a slave by a *feme covert* for three years, under a parol gift from her father, vests an absolute title to such slave in her, by operation of the statute of limitations.
2. **HUSBAND AND WIFE.** *Marital rights of the husband.* So soon as the wife acquires title to personal property, being in possession, the marital right of the husband attaches, and the title passes to him by operation of law, and he cannot divest himself of his right to property thus cast upon him by law, by declaring that it belongs to his wife. The property belongs to him, and upon his death, goes to his legal representatives for the payment of his debts.

FROM DEKALB.

This cause was tried at the April Term, 1858, before GOODALL, J., and judgment having been rendered in favor of the defendants, the plaintiff appealed.

COLMS, TURNEY, STONE and FARE, for the plaintiff.

M. M. BRIEN and R. CANTRELL, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This action of replevin was brought by the defendants in error, as the administrators of Wm. M. Wade, for a negro girl, slave, named Emiline, in the possession of Caroline Wade, widow of the intestate.

In 1846, the father of Mrs. Wade sent the slave to

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her as a gift, and she so remained for more than three years before the death of Wade. The father made a deed of gift to his daughter, but it was never delivered, and is therefore invalid. He states that the gift was absolute, though verbal, but he intended to get a lawyer to write a deed to the separate use of his daughter, but never did it. The husband always said the slave belonged to his wife, and was not his, never set up any claim to her. The wife, however, claimed her all the time.

The question presented is, whether, under these circumstances, this slave constitutes a part of the estate, and is liable for the debts of intestate. There is no doubt, but, that by operation of the statute of limitations on the parol gift, the title of the donor is extinguished. But it is contended, that, as the intestate never claimed the property as his own, no title would vest in him. But he claimed for his wife, and she held adversely to the donor. If her right was perfected by the operation of the statute, as well as by a writing, or otherwise, it would inure to the husband, as much as if it had operated upon an adverse holding and claim for himself. The law would fix the title in him the moment it become hers, without regard to his declarations. A man cannot denude himself of his right to property which the law vests in him, by simply declaring that it belongs to his wife.

The purposes and intentions of the donor to place restrictions and limitations upon the gift, which was never executed, can have no effect. He admits the donation was without qualification at the time it was made, and this is further established by the writing drawn up by

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him, but not delivered so as to take effect. The unexecuted design to restrict the slave to the separate use of his daughter, by a writing he intended to execute afterwards, cannot change the case. If this had been done at the time, or within three years afterwards, before the statute had placed the right beyond his control, it would have changed the case; but having been neglected the law must have its course, and the slave goes into the administration for the benefit of creditors or the distributees.

So the law was held below, and we affirm the judgment.

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DOWER. *Widow not dowerable of lands held in remainder. Act of 1784, ch. 22, § 8.* At the common law, an indispensable element in the claim to dower, is the *seizin* of the husband during the coverture. An actual *seizin* is not necessary. A *seizin* in law is sufficient. But the freehold and inheritance must be consolidated, and be in the husband *simul et senel* during the marriage, to render the wife dowerable. The husband is not thus seized of a remainder interest in land, during the continuance of the life estate, and if he die before the termination of such estate, his widow is not entitled to dower in said lands, upon the death of the tenant for life. This rule of the common law is not changed by the act of 1784, ch. 22, § 8.

FROM OVERTON.

This was an application for dower. Chancellor VAN DYKE pronounced a decree in favor of the complainants, at the April Term, 1858. The defendants appealed.

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SAM'L TURNEY, J. W. McHENRY and J. P. MURRAY, for the complainants, cited *Gourley v. Thompson*, 3 Sneed, 392; *Williams v. Williams*, 10 Yer., 25; 1 Jar., on Wills, 731, 733; *Combs v. Young*, 4 Yer., 225; 1 Bl. Com., 87; 2 Bl. Com., 129, 315, 316; 4 Kent's Com., 35, 38; Act of 1784, ch. 22, § 8.

SWOPE, STANTON and QUARLES, for the defendants, cited 4 Kent's Com., 30, 38, 39, 67, 40; Reeves Dom. Rel., 41, 54, 56; 5 Hay. R., 279.

WRIGHT, J., delivered the opinion of the Court.

The complainant, Elizabeth, is the widow of Jonathan Holeford, and claims dower in a tract of 150 acres of land in Overton county.

It belonged to his father, John Holeford, who died about the year 1835, leaving a will, in which he devised this land to his wife, Sally Holeford, during her widowhood, with remainder, in fee, to said Jonathan Holeford.

He married the complainant, Elizabeth, and died during the lifetime of his mother, the said Sally Holeford, who never again married, and is now dead.

The question now is, whether the said Jonathan was so *seized* of said tract of land, or had such estate or interest in the same, as that complainant Elizabeth can be endowed thereof?

The Chancellor was of opinion he had, and so decreed.

In this we think he erred.

At the common law, clearly, she was not entitled to

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dower, because her husband, Jonathan Holeford, was never seized of this estate. He had, to be sure, an estate of inheritance in remainder, but the freehold and life estates, and therefore the seizin, were in Sally Holeford, who survived him.

Blackstone in the 2d volume of his Commentaries, page 122, in treating of freehold estates, not of inheritance, says, "such estates for life will, generally speaking, endure as long as the life for which they are granted; but there are some estates for life, which may determine upon the future contingencies, before the life for which they are created expires. As if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet while they subsist, they are reckoned estates for life; because the term for which they will endure being uncertain, they may, by possibility, last for life, if the contingencies upon which they are to determine do not sooner happen."

So that in this case, and for the purpose of the determination of this question, there can be no doubt that we are to regard Sally Holeford as the owner of this estate for her life, and as having the freehold and seizin.

This being so, it is impossible that complainant, at the common law, can be endowed of this land.

An indispensable element in the claim to dower, was the seizin of the husband during coverture. An actual seizin was not necessary; a seizin in law being sufficient. But the freehold and inheritance must be consolidated,

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and be in the husband *simul et semel* during the marriage, to render the wife dowable. 4 Kent, 39. He must have been seized, during the coverture, of a present freehold estate, as well as of an estate of inheritance in the premises. *Dunham v. Osborne*, 1 Paige, 634.

The term *seizin* had a fixed legal meaning among common law writers; and whenever a freehold estate, such as that of Sally Holeford, existed in another, and prevented the husband from an immediate possession and enjoyment of the inheritance, his wife was not entitled to dower, because he had no *seizin* of the estate.

The authorities even went so far as to hold that, if upon the determination of a particular freehold estate, the tenant held over and continued his *seizin*, and the husband died before entry, or if he died before entry in a case of forfeiture for a condition broken, his wife was not dowable, because he had no *seizin* either in fact or in law. 4 Kent, 38.

These authorities are not controverted by complainant's counsel. But they insist that this rule of the common law has been so changed by the act of 1784, ch. 22, sec. 8, that she may now have dower in this estate.

To this we cannot assent. We find nothing in this act to justify any such conclusion, but quite the contrary.

By it the widow's dower is now to be one-third part of all the lands, tenements, and hereditaments of which her husband died seized or possessed, during her natural life.

It is evident that those who framed this act well understood the principles of the common law, and the meaning of its terms. In employing the term *seized*,

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we cannot doubt that they used it in its well-known common law sense; and so we must take it. This is the settled rule in the construction of statutes. If it had been intended to endow the wife of a remainder dependant upon a freehold estate, very different language would have been used.

An example may be found in the second section of the act changing the common law rule of descents. Here the provision is that when any person shall die seized, or possessed of, or having *any right, title, or interest* in and to any estate or inheritance of land, or other real estate in fee-simple, and such person shall die intestate, &c. This so altered the common law rule as to make the *actual seizin* of the ancestor unnecessary in order to make him the root or stock from which an inheritance might be transmitted; and now he may be accounted an ancestor who hath only a bare right or title to enter, or be otherwise seized. 2 Black., 209.

But as to the right of dower, we find no such phraseology. Statutes are not presumed to make any alteration in the common law further or otherwise than the act expressly declares, and are to be construed as near to the rule and reason of the common law as may be. 7 Bac. Ab. 456.

Looking to the entire act, we cannot doubt, that in order to entitle the widow to dower, it is still necessary that the husband shall, during the coverture, be seized of a present freehold estate, as well as of an estate of inheritance in the premises.

The term "possessed," used in the statute, cannot help complainant. For if it mean anything more than the word "*seized*," it certainly cannot be extended to

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an estate of which the husband was neither seized or possessed, and to the possession and enjoyment of which he had no right till the determination of an outstanding life estate. In *Tipton v. Davis*, 5 Hayw., 279, it is held not to embrace leasehold or equitable estates; and that the term possessed is not to indicate the quantum of estate, but the manner of occupation: and signifies, though not actually seized by inhabitancy, yet if he be so entitled by deed to a legal estate, as to have a legal right to the possession, then she shall be endowed.

But all this is, it seems to us, embraced within the common law sense of the term seized. And if so the terms are synonymous. But it is not necessary for us so to adjudge, conclusively.

If it be thought the law should be otherwise it is for the Legislature to change it, as was done in regard to equitable estates and estates in mortgage. Until this is done we must declare the law as we find it.

The decree of the Chancellor will be reversed, and the bill dismissed with costs.

S. F. MURRAY v. A. JOHNSON.

1. **PARTNERSHIP.** *Condition precedent.* If a partnership is entered into, a failure of one of the partners to comply with the terms and conditions of the agreement will not annul the partnership, unless they are conditions precedent.

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2. *SAME. Inequality of partners services.* There is no principle of law that authorizes an inquiry into the inequality of the services rendered by the members of a partnership, unless there is a stipulation in their agreement to that effect.
5. *CHANCERY PRACTICE. Evidence. Discrediting a defendant.* To the extent that a discovery is sought from the defendant in a suit in equity, he is the witness of the complainant, and the latter is bound by his statements unless he disprove them. This may be done by other evidence, but not by attacking the general character of the defendant.

FROM WHITE.

This cause was tried at the March Term, 1858, before VAN DYKE, Chancellor, who ordered an account between the partners. The defendant appealed.

COLMS and McHENRY, for the complainant.

SAM'L TURNEY, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

It very clearly appears from the proof in this case, that a partnership existed between these parties in the practice of medicine, in 1856. There is no doubt either as to the terms. They were to be at equal expense in carrying on the business; that is, for medicines, including the stock Johnson then had, and shop rent; and Murray was to have one-third of the profits. The parties disagreed and separated, and this bill is filed to settle up the partnership.

The defendant seeks to resist the bill upon the ground, that Murray was to pay him for one-half of the stock

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of medicines on hand at the time and attend actively to the business, in both which stipulations he utterly failed, and for that reason he is not entitled to claim as a partner. In fact he denies that the partnership contract was ever complete, as the conditions were not performed. Upon these issues of fact much proof was taken, and we are satisfied that the Chancellor was right in deciding that the existence of the partnership was established, and ordering an account. It is true that Murray did not pay for one-half the medicine on hand, but that would not annul the contract, as it was not a condition precedent. It may be true, also, that he did not devote himself to the practice and give attention to business as he should have done; but we are not aware of any principle that authorizes an inquiry into the inequality of services by the members of a partnership, without express stipulations to that effect.

But there is a question of practice, of some importance, presented in this case which it is proper to notice. The complainant was permitted to discredit the defendant by impeaching his general character, as in the case of a witness. The argument is, that when the answer is responsive to the charges or interrogatories in the bill, he is made a witness by complainant, and his statements are to be regarded as true, unless disproved by two witnesses, or one with circumstances; and, therefore, he should be subject to impeachment in all the modes applicable to witnesses proper. It is insisted that the weight to be given to his answer depends on the strength of his character. But that is not so. The rule is based upon the consideration, that the complainant had called upon him to answer as to certain facts, and thereby

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puts him in the place of a witness to that extent. Having thus forced him into the position he occupies, and compelled him to answer on oath to the limited extent he chooses to prescribe, it is but reasonable that he should be bound by the responses he has extracted, unless he can disprove them. He may weaken them by circumstances intrinsic or extrinsic, but he cannot be allowed to discredit by attacking the general character. He could not do this as to a witness called by himself, much less a party made by his bill. It is easy to see how such a practice could be abused by turning every contest for rights into a war upon character. Such a practice would be intolerable, and is not sustained by either reason or authority.

It would not have been thought necessary to notice this question, but for the fact that we are informed that it is tolerated in some sections of the country.

A complainant may, now, by virtue of a late statute, if he wishes to avoid the effect of the rule in favor of the answer, excuse the defendant from answering upon oath; in which case, the denials, only have the effect to form an issue to be decided by the weight of evidence.

The case will be remanded for the account ordered by the Chancellor. The defendant will pay the cost of this Court, but the cost of the depositions upon character will be paid by the complainant. The other cost below will be disposed of by the Chancellor on the final disposition of the cause.

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MARY SINGLETON v. JOHN W. LOVE et al.

1. **GUARDIAN AND WARD.** *Investing ward's money in land. Chancery jurisdiction.* The Chancery Court has exercised the jurisdiction of changing the nature of the personal estate of infants in cases where it was made to appear that it would be for their manifest benefit, but if the infant lives he may take it as real estate without prejudice to his right over it during infancy as personal property.
2. **SAME. Same. Same.** The Court has also supported a conversion by the guardian out of Court, in investing the ward's money in land, where the circumstances were such that the Court itself would have directed a like investment. But the ward, when he arrives at full age, has his election to take the land, or the money thus invested, with interest. And if he dies during minority, his proper representative will have the right to treat the real estate purchased with the infant's money as personalty, and distributable as such.
3. **SAME. Same. Election of the ward or representative.** Neither the ward nor the representative can elect to ratify the transaction in part and repudiate it in part. If an election is made to take the money invested, with interest, the party making the election will be required to relinquish all interest in the land purchased by the guardian.
4. **SAME. Same. Same. Case in judgment.** The guardian, at the request of the ward, then nineteen years old, sold a small piece of land, and invested the proceeds and other moneys of the ward in the purchase of other lands. The ward married, and died without issue, before attaining her majority. The sale and investment were for the manifest advantage of the ward. Her and her husband expressed themselves well pleased with the transaction. After the death of the ward her husband administered on her estate, and sued the guardian for the personalty due. He sought to ratify the acts of the guardian in part, and to repudiate them in part. It is held, that he was *estopped* from disaffirming the acts of the guardian—that it was an entire transaction, and the husband is bound by his approval, in part, of the acts of the guardian, and cannot recover the money invested.

FROM FENTRESS.

This cause was heard on bill and cross-bill. At the April Term, 1858, a decree was pronounced by Chan-

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cellor VAN DYKE, from which both parties appealed. The facts are stated in the opinion of the Court.

SAM'L TURNEY, for the complainant.

A. A. SWOPE, for the defendant, argued:

The guardian acted outside of her plain duty, and the minor had a right to disaffirm any contract made for her, and we do not think the Court of Chancery can compel the minor or her representative to take the realty against consent. The Court could do so by consent of the administrator, but not against it. A guardian or executor has no power to change the personal property of an infant into realty. If it is done, and the infant dies before twenty-one, a Court of Equity considers it as personalty, and will divest the legal title out of the heirs at law and vest it in the distributees. *Roberts and Wife v. Jackson's Heirs*, 3 Yerg. 77.

The administrator stands in the place of the ward, and has her rights fully, and may disaffirm, if she could. 2 Kent. Com., 237.

We, therefore, think that Love had a complete right to wholly disregard the purchase of the interest in the dower lands, and sue at law for the personalty as though said purchase had never been made.

But the Chancellor thought that the contract would have resulted beneficially for the minor, and affirmed the acts of the guardian against the wishes of the ward's administrator. If the Court of Chancery has the power to affirm in this State (a power which we doubt) against the consent and wishes of the ward, or the per-

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sonal representative, if she be dead, then there is a clear power as well as duty in the Court to reimburse and put the husband in the same situation as he would have been in if the conversion had not been made. Story's Eq., 1356-7.

The Court exercises a most vigilant care over the rights of infants, and conversions of this kind are never looked upon with favor, though the restrictions might be good. Story's Eq., 1357-511.

It must appear *manifestly* for the benefit of the infant, at least, before the Court will confirm in any case. Story's Eq., 1357. How can it be *manifestly* for the benefit of a young lady to vest all her fortune, small at least, into an undivided *remainder* interest in a tract of land encumbered by a dower estate? We do not think such was the case. It was, probably, nothing more than a whimsical notion of the mother for the purpose of preserving the homestead remainder in the family, or what is more probable, the result of the machinations of Crouch to get hold of the small piece of land belonging to the minor.

Now, upon the whole case, as agreed to be opened by complainant, the Court can adjudicate all the questions in the case, and give such judgment and decree as the Court below should have given.

McKINNEY, J., delivered the opinion of the Court.

The complainant was guardian of her minor daughter, Catharine Singleton, who, in the year 1854, at about the age of twenty years, intermarried with the defend-

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ant, Love, and died some six weeks after her marriage. In a short time after the death of his wife, Love brought a suit at law against the complainant and her sureties, on her guardian bond, to recover what he claimed to be the personal estate of his deceased wife—having previously taken out letters of administration on her estate. To enjoin this suit, and to obtain a decree confirming her acts as guardian in the conversion of the property of her ward, are the objects of the bill.

It appears that the estate of the ward consisted of about \$172 in money, a piece of land of about thirty acres, and an undivided interest, as tenant in common with her brothers and sisters, in the tract of land on which the family had resided, descended from her deceased father, Daniel Singleton, and on which she and her mother continued to reside. In the year 1853, and not very long before her marriage, she expressed an earnest desire to become the sole owner of the tract of land on which she and her mother lived, by purchasing the shares of her brothers and sisters, or as many of them as she could raise the means of paying for. And, being then of the age of nineteen, she urged her guardian to make sale of the thirty acre tract of land, which was of but little value, and to invest the proceeds thereof, together with her money in her guardian's hands, in the purchase of the homestead.

According to her wishes, the complainant, as her guardian, sold the thirty acre tract to one Crouch for \$200, which was a full price for it, and proceeded to purchase five shares of the home place, at \$50 each, which is shown to have been not much more than half the value of said shares. In this way one hundred

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dollars of the proceeds of the thirty acre tract, and one hundred and fifty dollars of the money in the guardian's hands, were expended for the benefit of the ward. For the remaining \$100 of the price of the thirty acre tract, the guardian held the note of the purchaser; and this, with a balance of about \$22, constituted the entire personal estate of the ward remaining after said purchase.

In all this transaction the guardian seems to have acted in the utmost good faith, and with no other motive than to promote the best interests of her ward. The transaction is shown by the proof to have been highly advantageous to the ward, and seems to have been fully approved by her up to her death.

It appears also that the defendant, who lived in the neighborhood, had full knowledge of all these facts before his marriage with said ward, and approved and acquiesced therein, fully, until after the death of his wife. And in confirmation thereof, he received from the guardian, after his marriage, the \$100 note taken in part for the purchase of the small tract of land, and brought suit to recover the money due thereon after his wife's death, as administrator of her estate, and obtained judgment accordingly. And, furthermore, in his answer he expressly ratifies the sale of the thirty acre tract, and declares his willingness to make any such title to the purchaser for the same as the law authorizes. Ascertaining afterwards that he could not hold the land purchased for his wife, and claiming the right to dissent from, and to annul the contract for the purchase of the land, by the guardian, he instituted suit upon the guardian's bond

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to recover the sum of two hundred and fifty dollars, the amount paid for said land.

The Chancellor, by his decree, fully approved and ratified all the acts of the guardian in the premises; but held, nevertheless, that the defendant was entitled to be reimbursed the amount of money invested in the land, and so decreed against the complainant. And the case is brought here by both parties.

It is true as argued, that, as a general rule, a guardian has no power without the direction of a Court of Chancery to convert the personal estate of the infant into real, or to invest his money in land. Neither has the guardian any power whatever to convert the real estate into personal. The Court of Chancery itself has no inherent original jurisdiction to convert the real estate of an infant, as we have recently determined—the power to do so being derived entirely from the statute of 1827.

But as respects the investment of an infant's money in land, the jurisdiction of changing the nature of the estate has been exercised by the Court in cases where it was made to appear that it would be for the manifest benefit of the infant; but, in the language of Lord ELDON, "with this qualification, that if he lives, he may take it as real estate, but without prejudice to his right over it, during infancy, as personal property." 19 Ves., 122. And, in some cases, the Court has supported a conversion by the guardian out of Court, in investing the infant's money in land, where the circumstances were such that the Court itself would have directed a like investment. But the infant, when he arrives at full age, will have his election to take the land, or the money thus invested, with interest. And if he dies under

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the age of twenty-one, his proper representative will have the right to treat the real estate purchased with the infant's money, as personalty, and distributable as such.

From these principles it clearly follows that the wife of the defendant, had she lived to attain her full age and remained *sole*, might have treated the acts of her guardian in selling her real property and laying out her money in other lands, as not binding; or she might have affirmed them. But it is clear, that had she elected to disaffirm the purchase, she would have been required to relinquish all title to the land purchased by the guardian.

And as she married during minority, her husband, who was *sui juris*, might, perhaps, upon his marriage, with her concurrence, have disaffirmed the acts of the guardian; or, inasmuch as she died before arriving at full age, the husband, upon his appointment as administrator, might then have dissented. But he did not do so at either period.

During the life of his wife he seems to have fully acquiesced, and to have regarded it, as did all other persons, as a most beneficial arrangement for his wife. And after her death he approved and ratified the act of the guardian, so far as respects the sale of the thirty acres of land, by the unequivocal act of receiving, suing for, and appropriating to his own use the note for \$100, taken in part payment for said land; and in his answer, as well as in the cross-bill, he still expresses his approval of that transaction, and his willingness to make title to the purchaser, as before stated. By this act he is concluded as to the whole matter. Neither the ward

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nor the husband in her right, could elect to ratify the transaction in part, and repudiate it in part.

It was essentially an entire transaction. One-half of the price of the thirty acres was discharged by a transfer to the guardian, for the benefit of the ward, of two shares of the home place; and as part of one entire agreement with the ward, the money of the latter, about the same time, was expended in the purchase of the other shares. And being entire, it must be ratified or rejected as a whole.

In view of all the facts, we think the decree of the Chancellor, so far as it approves and confirms the acts of the guardian in the purchase of the several shares of the home place, was correct, and we affirm it thus far, being fully satisfied that, in every view, it was a most profitable and judicious arrangement for the interest of the ward. But, in so far as the decree holds the defendant entitled to be reimbursed the amount invested in the purchase of the land, it is erroneous, being self contradictory and repugnant. The effect is, to declare that the guardian properly invested \$250.00 of the infant's money in the purchase of the land, which was, to that extent, a sufficient discharge of the liability of the guardian: but, notwithstanding she had rightfully once accounted for the money in that way, to charge her with the payment of it a second time, in favor of the husband, who, by his acts of confirmation, is precluded from any relief. There is no principle upon which this part of the decree can be sustained.

The result is, that the land purchased descends to the heirs of the wife, she having died without issue born of the marriage with defendant. All that the de-

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fendant can claim in this case, is the small balance of money remaining in the guardian's hands after the purchase of the land. The cross-bill will be dismissed and, with the modification before indicated, the decree will be affirmed.

C. LEA et al. v. C. MAXWELL et al.

1. **ATTACHMENT.** *What a sufficient levy of.* The attachment writ came to the hands of the sheriff, who proceeded to levy the same on the property specified in the bill and writ. He endorsed the day the writ came to his hands, wrote out his levy and returned it with the writ, but neglected to sign his name to it until after the return, and after he went out of office. It is held, that this was a good levy, and gave the first attaching creditor *priority* of satisfaction over subsequent attaching creditors, whose levies were more formal.
2. **SAME.** *Admission of a levy in the bill. Estoppel.* If a subsequent attaching creditor admit in his bill, that an attachment had been issued at the suit of another creditor, and levied, and the property placed in the custody of the law, such creditor is *estopped* to deny the validity of the levy of the first attachment.

FROM OVERTON.

Several bills were filed by the creditors of Maxwell, attaching his property. The main controversy was as to whether Lea had priority of satisfaction over the other creditors. Chancellor VAN DYKE was of opinion that

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the levy of his attachment was valid, and so decreed. The other creditors appealed.

GOODPASTURE and JONES, for Lea.

SWOPE and McHENRY, for the other creditors.

WRIGHT, J., delivered the opinion of the Court.

These are attachment bills in the Chancery Court at Livingston, by the creditors of Cornelius Maxwell a non-resident debtor.

Various bills were filed by different creditors at different times. First by C. Lea, next by George W. Gore, third, by Lanier & Phillips, and lastly, by Thomas Maxwell.

A fund was produced by the sale of several tracts of land and other property, under a decree made in these causes, the same having been consolidated before the hearing.

The bill of C. Lea was filed and the attachment issued upon it and actually levied, before the bills of the other creditors were filed.

But they deny him priority or any interest in this fund, because they allege the sheriff made no valid or legal return of the levy upon the writ; and that, therefore, C. Lea acquired no lien, or if he did, it has been lost by the omission of the sheriff to make the return.

This position is untenable. In the first place, it will be found upon an examination of the pleadings in these causes, that it is distinctly stated by George W. Gore,

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Lanier & Phillips, and Thomas Maxwell, that C. Lea's attachment had been levied and the property placed in custody of the law. And it is manifestly too late now to make this a question in the cause.

But if this were not so, still the levy of C. Lea can be maintained as valid.

The attachment bill in his favor, and the writ of attachment issued upon it, specifically describe the land and other property sought to be attached.

The writ appears to have come to the sheriff's hands on the 28th of April, 1857; and, on the 30th of that month, we find by his endorsement thereon, over his own name, a deputation to Wm. H. Wilson, "to levy on the yoke of oxen, that I did not levy on the 29th of April, 1857, by virtue of this attachment." And on the 1st of May of that year, Wilson, the deputy, makes his return on the attachment, showing that he had levied on the oxen. And upon a separate sheet of paper returned with the attachment by the sheriff he gives the title of the suit thus: "*Canada Lea v. Cornelius Maxwell, attachment;*" and then proceeds to state precisely when the writ came to his hands, and what he had done under it, showing that he had levied it upon all the property "described in the attachment in this cause issued by the clerk of the Livingston Chancery Court, on the 28th of April, 1857, in the suit of *C. Lea v. C. Maxwell, and others.*"

To this return his signature is affixed, and immediately thereafter, on the same paper, is endorsed a further levy on the 29th of April and 1st of May, 1857, of some things which seem to have been omitted by the sheriff; and this is signed by Henry Lea, deputy sheriff.

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Hamilton, the sheriff, was examined as a witness and filed his deposition in the cause, in which he proved, that as sheriff of Overton county he made the levy at the time, and in all respects as stated in the above endorsements, and returned them with the attachment to the clerk and master's office, to be filed in the cause; but from oversight omitted to sign his name to the return on the separate sheet of paper, until he had gone out of office, believing he had already done so. The argument here is, that this return is void, because not signed by the sheriff until after he had gone out of office; and, therefore, Canada Lea can have no lien or priority in virtue of his attachment.

It would, we think, be difficult to maintain this argument upon the face of these returns. But conceding that the sheriff could not be allowed to sign his return after he had gone out of office, and while the cause was yet pending in Court, and that the signatures of his deputies had no effect, yet it is a sufficient answer to this argument to say, that the levy being once *actually made*, its force and efficacy could not be destroyed or impaired by the failure of the sheriff to make a return of it; and especially so in a proceeding like this, where the property was described in the bill, and in the writ of attachment, and the Court had proper evidence of the levy, and proceeded to decree a sale of the property by proper description of it. In such a case, the purchaser's title is complete.

We do not understand the law to be, that where a levy is made, the creditor's rights under it, are dependent upon the sheriff's return.

This principle, we think, is sustained by the case of

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Mitchell v. Lipe, 8 Yer., 179, and authorities there referred to; *Jackson v. Sternberg*, 1 Johns. Cas., 185; *Wheaton v. Sexton*, 4 Wheat., 503.

That this levy was not impaired, we think will appear from another consideration.

It was the duty of the sheriff to levy these attachments in the order of time he received them. This he did, and made the proper returns in all the cases, except that of *Canada Lea*. These returns certainly gave the Court of Chancery jurisdiction to decree a sale of the property by which the fund was raised. Now is it possible, that in the distribution of this fund, where it is seen that all of these writs were in the hands of the sheriff, or his deputy, at the same time, and were actually levied on the same property, *C. Lea's* being first levied, that it can, upon any just principle, be held that *Canada Lea* is to have no part in it, because the sheriff failed to make a return of the levy in his favor? We think not.

The Chancellor took this view of the case, and we affirm his decree.

STATE, FOR THE USE OF *BURNS v. JOSEPH CLARK et al.*

1. CONSTABLE. *Bond. Liability of sureties.* If a person whose term of office as constable has not expired, is a candidate for re-election at the regular March election, and is successful, and enters into bond with security before the Court, such bond is good at common law, and

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being a good common law bond, is a good statutory one, and the securities are liable upon the same.

2. **SAME.** *Question reserved.* As to the effect of the second election, in case another had been elected, and a contest existed for the office, or between others as to their official acts; or if an act performed after the expiration of two years from the first election should come in question, is reserved.

FROM DEKALB.

There were verdict and judgment for the defendants at the October Term, 1858, MURRAY, J., presiding. The plaintiff appealed.

R. CANTRELL, for the plaintiff.

M. M. BRIEN and JORDAN STOKES, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This suit is brought upon the official bond of John F. Lucky against his sureties, for the failure of Lucky to pay over certain moneys collected by him as an officer for the plaintiff, Burns.

The defence relied upon by the defendants is, that they are not liable, because the election of Lucky was a nullity, and the official bond therefore void, at least as to them as sureties.

The question arises upon this state of facts. A vacancy occurred in the office of constable, in the 1st civil district of DeKalb county, by the resignation of the incumbent, in January, 1855; and on the 26th of that month Lucky was elected to fill the vacancy, and

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on the 5th of February, 1855, was qualified, and entered into bond, as required by law, in the County Court of that county. On the 1st day of March, 1856, at the general election of county and district officers, he was a candidate for the same office, and succeeded. Under this election, he was again qualified by the County Court, on the 3d day of March, and then entered into the bond, on which this suit is brought, with the present defendants his sureties, for the faithful performance of his duties.

The point made is, that by the constitution his first election was for two years, and so there was no vacancy in the office at his second election, and consequently it was void, and the bond being unauthorized, was a nullity.

To sustain this position we are referred to *Keys v. Mason*, 3 Sneed, 6-10, where it is decided by this Court, that a justice of the peace elected to fill a vacancy, holds his office and has a right to exercise its functions for the constitutional term of six years, instead of the remaining fraction of the term, as provided by the act of 1835, ch. 1, sec. 15. In the previous case of *Brewer v. Davis*, 9 Hum., 208, the same principle was settled in reference to a clerk of the Circuit Court. In these cases, as well as that of *Clemmens v. Cato*, 4 Sneed, 291, the questions arose upon the legality of the official acts of the officers, where there were conflicting claims to the office. But here it is entirely different. Lucky was the legal officer under any construction, as he was successful at both elections. It would not be controverted, that he might have resigned the office and accepted a re-election, at the March election, in 1856.

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In that case, there could have been no controversy. He had a right to claim the office for two years from his first election, on the principle of the cases cited; but he could surrender it, and upon a successful canvass at the regular election, be entitled to two years from that time. Is it not tantamount to a resignation to become a candidate at the last election, and conform to all the requirements of the law as to taking the oath of office, giving new bond, &c.? How this would be in case another had been elected, and any contest existed between them for the office, or between others as to their official acts, or where an act performed after the expiration of two years from the first election should come in question, we need not now decide, as this case does not, necessarily, present that difficulty. These sureties cannot be allowed to avoid their bond, voluntarily entered into, upon any such grounds. In any event, it would be good at common law, and they are sued in this common law action for a breach of its conditions. By our statute, also, a bond good at common law, is likewise a good statutory bond. It is no objection to it, that it was entered into before the Court, even if the last election was unnecessary for the continuation of Lucky in the office. But it cannot be said that this election was unconstitutional, for at most, it was only unnecessary. There was nothing against public policy, illegal or immoral, in the election or the execution of the bond, by which it would be rendered void. If Lucky submitted to a re-election, and the Court sanctioned it by inducting him anew into the office, and the defendants approved it by signing his official bond, it is not for them, whatever others might have a right

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to do, to question the proceeding or escape from the obligations imposed.

The North Carolina case to which we are referred, of *The State v. Shirly and others*, 1 Iredell, 597, does not, as we think, conflict with this view. There the constable had entered into bond before a single magistrate, out of Court, when the law required it should have been in Court. The Court held, the bond was not taken by the authority authorized by law, to act for the State in that matter, and, therefore, not legally *delivered*. It is very questionable whether the fact that it was delivered to the County Court and there kept on file, was not an acceptance that would make it binding. But this is a very different case, even if that was correctly decided. Here the bond was taken by the proper authority, and in the proper form.

We think this bond was binding upon the parties, and that the Court erred in holding otherwise, for which the judgment is reversed, and the cause remanded for a new trial.

S. A. LOOPER v. JAMES L. BELL.

1. **DEPOSITIONS.** *Justice's certificate.* Act of 1801, ch. 5, § 32. The act of 1801, ch. 5, § 32, applies exclusively to depositions taken in equity causes, and not to depositions taken in cases pending in Courts of Law. There is no law or rule of Court in force, requiring the justice taking depositions at law, to certify that he is not interested in the event of the suit, nor of counsel or attorney for either party.

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2. **SAME.** *Same. Read without exception.* If a deposition is read in the Court below without exception, or if excepted to, and the exceptions not acted on, or if the deposition of the excluded witness is retaken and read without exception, substantially proving the facts stated in the first deposition, no error exists for which a new trial will be granted.
3. **SAME.** *Leading questions.* If leading questions are put, and answers permitted by the Court to go to the jury, it would be difficult to assign it, in the Supreme Court, as error. But, upon the hypothesis that it can be done, the party excepting for this cause, must specifically point out and make his objection to the illegal matter. He cannot put the Court in error by a general exception.
4. **EVIDENCE.** *Statements of the slave.* Statements made by a slave to the attending physician, while investigating the character and symptoms of his disease, are admissible as evidence.
5. **OATH.** *Administered with up-lifted hand. Exception must be taken at the time.* An oath administered with an up-lifted hand, is legal and binding; and if the jury selected in a cause be thus sworn, no error can be predicated of the oath. If the jury be not legally sworn, and the party or his counsel make no exception at the time, the objection cannot be made available in the Supreme Court.

FROM OVERTON.

The defendant was sued for a breach of warranty in the sale of a slave. The jury were sworn with up-lifted hands, no exception being taken at the time by the defendant, or his counsel. Various exceptions were taken to the evidence, in the progress of the trial, which are referred to in the opinion of the Court. The cause was tried before GOODALL, J., at the February Term, 1858. There was verdict and judgment for the plaintiff. The defendant appealed.

S. TURNER, for the plaintiff in error.

GOODPASTURE, MCHENRY and SWOPE, for the defendant in error.

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WRIGHT, J., delivered the opinion of the Court.

The first error assigned for the reversal of the judgment in this cause is, the reading of the deposition of B. G. Hampton, because the justice of the peace who took it, did not certify that he was not interested in the event of the suit, nor of counsel or attorney to either party.

This position has nothing in it for several reasons. In *Blair v. The Bank of Tennessee*, 11 Hum., 84-88, it was decided by this Court, that the act of 1801, ch. 5, § 32, applies exclusively to depositions taken in equity causes, and not to depositions in cases pending in Courts of law; and that there was no law or rule of Court in force, requiring such a certificate in Courts of Law. But if this were not so, the deposition was read upon the trial without objection on this point, and it cannot now be insisted on as error in this Court. It is true, exceptions were filed in 1856, to the form of the certificate, but they were never acted on by the Court; and at the trial of the cause in 1858, they were not renewed, and so the benefit of this matter was lost. 1 Swan, 57-338. Besides, the deposition of the same witness taken after the former, in which the same facts are substantially proved, was read without exception or objection, as to this matter, and so defendant could not have been prejudiced by the reading of the former deposition.

It is next objected, that in the examination of Hampton, Bogwall, and Bell, leading questions were put to them, and their answers permitted by the Court to go to the jury. But if this were so, it would, we appre-

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hend, be exceedingly difficult to assign this as error in this Court. 1 Greenl. on Ev., §§ 434-435; *Moody v. Rowell*, 17 Pick., 498. But without laying down any rule as to this question, we have, from an examination of the depositions, been unable to discover that they were objectionable on this ground, under the rules of law applicable to such questions. 1 Greenl. on Ev., 434-435. Certainly some of them are not, and the greater portion of all of them are free of exception on this score. And if certain parts of any of these depositions could, legally, have been excluded by the Court, the defendant should, specifically, have pointed them out, and made his objection to the illegal matter in them. He could not put the Circuit Judge in error by objecting, as he did, to *all* of these depositions. *Whitley v. Davis' Lessee*, 1 Swan, 338-336.

The next error assigned is, that the Court permitted Low, a witness, to prove that Bogwell and Hamilton were physicians, and their places of residence. But it is impossible for us to perceive how the defendant was prejudiced by this evidence. It was certainly material to show that Bogwell and Hamilton, who were witnesses in the cause, and had attended the slave in question during his last illness, were physicians.

Objection is next made to the manner in which the jury were sworn. But the principle of the case of *Doss v. Birks*, 11 Hum., 431, is decisive against the objection. Besides, the defendant and his counsel were present when the jury were sworn, and did not then complain, and cannot now be heard in this Court upon the question.

It is finally said the Court erred in permitting the statements of the slave, as to the duration of his sick-

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ness, to go to the jury. The statement objected to was made to Dr. Hampton, the attending physician, who proved that the slave died the 8th of September, 1854, of scrofula; that, in his opinion, the disease was of long standing, and upon him when Bell purchased him; that the slave stated that he had labored under an attack of a similar kind for several years past; and that, from a post mortem examination, he believed the statement correct. From this record, we are forced to believe that this statement of the slave was drawn from him by Dr. Hampton, while investigating the character and symptoms of his disease; and was, therefore, admissible evidence under the rule laid down in *Yeatman & Armistead v. Hart*, 6 Hum., 375, and *Jones v. White*, 11 Hum., 268-270.

Judgment affirmed.

DAVID KOGER v. JOHN DONNELL *et al.*

EXECUTION. *Return of.* An officer is bound to return an execution within the time prescribed by law, unless authorized by the plaintiff to hold it up. Simply authorizing or directing a postponement of the sale of property levied on, is not sufficient to excuse a return of the execution.

FROM DEKALB.

This was a motion for failing to return an execution within thirty days. The Court, MURRAY, J., presiding, refused the motion. The plaintiff appealed.

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STONE, BRIEN and COX, for the plaintiff.

R. CANTRELL, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

This is a motion against the sheriff of DeKalb county and his sureties, for failure to return an execution issued and placed in the hands of his deputy, within thirty days. The fact is admitted, but attempted to be excused on the ground of consent on the part of the plaintiff. The Circuit Court refused the motion.

The fact seems to be, that, as to the execution against Perkins, after the levy upon property, upon the application of the officer and the defendant, upon reasons stated by them, Koger consented, in effect, that the sale should not be then made. His words were, as proved, that "he reckoned it would be best to hold on, or hold up, but to hold on to the property and not let it be taken by other executions." There was nothing said about not returning the execution, or holding it up.

This was sufficient to excuse a sale at the time, but not the return of the execution within the thirty days prescribed by the statute.

It is true, as decided in *Robinson v. Harrison*, 7 Hum., 189, that an officer will not be liable for a neglect of this duty, where he acts under the directions or consent of the plaintiff; but this is not a case of that sort. The plaintiff gave no order or consent on the subject. He had reference only to the time and manner of sale, and said nothing about the execution or its re-

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turn. The property was vested in the officer by the levy, and he could have sold as well without, as with the execution. The retention of the execution was not necessary for that purpose. He did not need an alias, or order of sale.

The act giving this remedy by motion is very penal and severe, but its enforcement is required by public policy. Officers should conform to this requirement, to return executions promptly, so that all concerned may know how they have performed their duties.

Reversed, and judgment here upon the motion.

PLEASANT M. ARMSTRONG v. HENRY HARRISON.

1. ACTION. *Discontinuance of.* If a party permit a *chasm* in the proceedings to occur, by failing to continue the process regularly from term to term, until service on the defendant, it operates as a *discontinuance* of his suit.
2. PRACTICE. *Motion to enter a discontinuance.* The process forms a part of the record of the cause; and, therefore, a motion is the proper form of proceeding to present the question of discontinuance.

FROM OVERTON.

This cause came before the Court, GARDENHIRE, J., presiding, at the September Term, 1858, upon a motion to dismiss the suit. The Court sustained the motion, and the plaintiff appealed.

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SWORE, for the plaintiff, said :

This action of debt was commenced in the Circuit Court of Overton, on the — of December, 1857. The writ of summons not being served, the plaintiff failed to take out an alias at the February Term; but at the June Term an alias was awarded on the record, and it was afterwards issued and served on the defendant. At the return of this alias, at the September Term, the defendant *appeared, after the filing of the declaration*, and moved the Court to discontinue the suit; which motion was sustained, and the action dismissed with costs, to which plaintiff excepted.

We think the Court erred in its action. It is true, that, according to the rigorous practice of the common law in England in early times, this course would be right; but we think that rigor somewhat abated in our practice. There, a day was set for the defendant to appear in Court, and if the plaintiff did not appear and take out an alias, it was held that there was a chasm or breach in the proceedings which totally discontinued the suit. It is difficult to discover any solid reason for this great strictness, and it seems rather fictitious and formal than real; and it is believed that the same rigidity will not now be required. No case is now remembered, decided by this Court, precisely in point. The case of *Slatton v. Johnson*, 4 Hayw. Rep., is relied on by defendant. That was a case upon the power and practice of the *County Court upon attachment*. A discontinuance cannot take place during the *placitum*, nor after declaration filed, nor after the appearance of defendant. Bouveir's Law Dic. Titles Discontinuance; Continuance; Practice.

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Here the party was duly summoned on the alias writ, and, after the filing of the declaration, appeared in Court, which, we think, cures the defect, if it be one.

One of our own cases, not now at hand, holds that after the issue is made up, though the case lies seven years without any steps, there is no discontinuance.

JONES & McHENRY, for the defendant, argued that—

The only question in the cause is, was the suit properly dismissed? It appears from the record that the original writ was sued out on the 23d day of December, 1857. It also appears that there was no order for an alias at the February Term, 1858, of said Court; nor was there an alias writ issued returnable to the June Term, 1858, of said Court.

It is a rule of law, that if the plaintiff suffer a term to elapse or pass without suing out an alias writ, his suit can be discontinued by motion. See Tidd's Practice, vol. 1st, *vide* page 626.; Caruther's Law Suit, page 15; 5th Hay.; 2d Bl. Com. page 96.

McKINNEY, J., delivered the opinion of the Court.

This was an action of debt. The defendant was brought in by the service of an *alias* summons. At the return term the defendant appeared, and moved the Court to enter a *discontinuance* of the plaintiff's action on the ground of a chasm in the proceedings, by fail-

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ing to continue the process regularly from term to term, until service on the defendant. The Court sustained the motion, and ordered the suit to be dismissed. And in this, it is alleged, there is error.

It appears from the record, that the original summons issued on the 23d of December, 1857, returnable to the February Term, 1858, of the Circuit Court of Overton, and was returned to said term, "not found." At the June Term, 1858, an *alias* summons was, by order of the Court, awarded; which was issued, and returned executed to the September Term, 1858.

It is clear that the neglect of the plaintiff to continue the process from the February; to the June Term of the Court, was a discontinuance. The fact that the *alias* summons was awarded by an express order of the Court avails the plaintiff nothing. The discontinuance was complete before this order was made; therefore the Court had no power to make such order, and it must be treated as a mere nullity.

Under our practice, no exception can be taken to the mode by which the question of discontinuance was raised and disposed of. By express legislative enactment, the "process" forms part of the record of the cause. And this being so, a *motion* was the proper form of proceeding to present the question of discontinuance. It was not necessary, nor would it have been a proper practice, to present, by plea, a matter which fully and distinctly appeared to the Court from the face of the record. See 7 Hum., 66.

There is no error in the judgment, and it will be affirmed.

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HILL AND McDONALD v. ISAAC McDONALD *et al.*

SLAVES. *Parol sale of remainder interest void.* A remainder interest in slaves is incapable of delivery during the continuance of the life estate, and a valid disposition of such interest can only be made by deed or other writing. It cannot be done by parol.

FROM OVERTON.

This cause was heard before Chancellor VAN DYKE, at the April Term, 1858. A decree was pronounced in favor of the complainants. The defendants appealed.

SAM'L. TURNEY and W. E. B. JONES, for the complainants.

A. A. SWOPE and J. W. McHENRY, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The uniform course of decision in North Carolina and Tennessee under the act of 1784, has been that a parol gift or sale of a slave is invalid, as between the parties, when such parol gift or contract of sale is neither accompanied nor followed by the delivery of the slave to the donee or bargainee.

The authorities as to this are numerous and abundant; but we need only to refer here to *Payne v. Lassiter*, 10 Yer., 507.

There was no bill of sale, or writing of any kind,

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made or used in the purchase of the shares of Isaac, Jason, and Thomas McDonald in the slave Martha and her children, by Sells McDonald. Nor did any delivery accompany or follow the sale, which was merely verbal.

It follows, upon well settled principles, that Sells McDonald acquired no title whatever in their shares of these slaves.

Moreover, we think, situated as these slaves were at the time Sells McDonald purchased them, they were incapable of delivery; and that he could only have made a valid purchase or contract, by deed or other writing, and not in parol. The bill charges, and the record abundantly shows, that, at the time of the purchase, the said Isaac, Jason, and Thomas did not have possession of said slaves, but only an estate in remainder or reversion therein to the extent of their shares; and that Susan McDonald, the widow of Allen McDonald, had an estate for her life in said slaves, accompanied with their actual possession; and that this life estate continued until long after Sells McDonald's death, and since the filing the bill in this cause, when Susan McDonald, the tenant for life, died. In this state of the facts it will be found by referring to the principles laid down in *Payne v. Lassiter*, and other authorities, that there could have been no delivery of these slaves, the possession and rights of the tenant for life presenting an insuperable obstacle. *Payne v. Lassiter*, 10 Yer., 507; *Lawrence v. Lawrence*, 2 Swan, 141; *Hallum v. Yourie*, 1 Sneed, 369.

It is not pretended that any attempt at a delivery was made, or that the tenant for life made any surrender of her rights and possession for that purpose. But the reverse is shown in the bill and the proof.

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The difficulty of a want of delivery is attempted, in argument, to be obviated from the fact that Sells McDonald lived in the family of his mother, the tenant for life, and exercised some sort of control over her slaves—whether over these particular slaves is not shown. Nor does the nature or extent of his agency in her business precisely appear. But there is nothing in this argument since it is very clear, from this record, that Sells McDonald never had or held possession of these slaves in his character of *purchaser*, but that the possession was, at all times, in the tenant for life; and whatever he did was as her agent, and in subordination to her estate. *Caplinger v. Sullivan*, 2 Hum., 548.

The result is, that the Chancellor's decree will be reversed.

THOMAS LEWIS v. JOHN BAKER et al.

1. CHANCERY PRACTICE. *Sale of property. Debt first to be ascertained.* When it becomes necessary to order a sale of land to pay a debt, the exact amount due must be ascertained and stated in the decree, and a reasonable time given the defendant to pay the amount into the office of the master, before proceeding to sell. It is an erroneous practice to refer the matter to the master to ascertain and report, to the next term, the amount due; and in the meantime direct a sale of the land if the debt is not paid into the office by a day specified.
2. WRIT OF ERROR. *Effect of upon title. Act of 1835, ch. 20, § 16.* By the act of 1835, ch. 20, § 16, if a decree has been executed by a sale of property, either real or personal, before a writ of error is

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obtained and superseded as granted, the title of the purchaser under said decree is not affected by a reversal of the same upon a writ of error.

FROM WHITE.

At the September Term, 1858, Chancellor VAN DYKE pronounced a decree in favor of the complainant. The facts are stated in the opinion of the Court.

COLMS, for the complainant and purchaser.

T. B. MURRAY, for the defendant, John Baker.

WRIGHT, J., delivered the opinion of the Court.

The complainant being a creditor of defendant John Baker, filed this bill against him and his two sons, Jacob A. and Edmund C. Baker, to set aside a deed of conveyance of a tract of land executed by him to his said two sons. The bill charges the deed to be fraudulent as against the creditors of John Baker, and prays for a sale of the land to pay complainant's debts.

At the March Term, 1857, of the Chancery Court at Sparta, the cause came on for hearing, and a decree was pronounced, declaring the deed fraudulent as against complainant; and in the decree, a reference was made to the clerk and master to take and state an account of the indebtedness from John Baker to the complainant, the same not appearing, satisfactorily, to the Chan-

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cellor, and to report the amount to the next Term of the Court.

Without waiting for the coming in of said report, the Court proceeded further to decree, that unless the said John Baker should pay into the office of the clerk and master so much money as would satisfy the debt and interest, that might be due the complainant, and the costs of suit, within four months thereafter, the clerk and master should sell the tract of land on a credit of six months, giving the proper notice, taking bond and security from the purchaser, with a lien upon the land, and report the sale to the next term of the Court.

Baker failed to pay the money, or comply with the decree, and the clerk and master, as directed therein, on the 31st of August, 1857, sold the land, when Wesley Graham became the purchaser, at the price of \$457.00, and fully complied with the terms of the decree by the execution of his note for the purchase-money, with security, due at six months.

This sale, with the sum due complainant, which was found to be \$188.57, was reported by the clerk and master to the next term of the Court in September, 1857, when the same was, by decree of the Court, confirmed. No appeal was prosecuted by the defendants from these decrees, nor any writ of error, or superseas obtained, to stay the sale by the master. Nor do the defendants, Jacob A. and Edmund C. Baker, now complain, or prosecute any writ of error. And the case is here only as to John Baker, who, on the 15th of December, 1857, filed a transcript of the record with the clerk of this Court, and obtained a writ of error by giving bond and security for costs.

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It is useless for us to inquire whether there are any errors in this decree, as to Jacob A. and Edmund C. Baker, since they are not before us.

As decided by this Court in the case of *Codwise v. Taylor, et al.*, 4 Sneed, 346, it was an erroneous practice, to order a sale of this land, before the amount of complainant's debt had been ascertained by a reference to the master, or by the Chancellor.

The exact amount to be paid should have been ascertained and stated in the decree, and then a reasonable time ought to have been given the defendants to have paid the amount into the office of the Court, before proceeding to sell the land. And if John Baker had prosecuted a writ of error and supersedeas before the decree of the Chancellor was executed by a sale of the land, we should have been constrained to reverse the decree. But he did not do this, and, as we think, now has no right to ask that this decree be reversed, so as to affect this sale. The act of 1835, ch. 20, sec. 16, (C. & N. Rev., 232,) declares that if the decree of the Chancellor has been executed by a sale of the property, either real or personal, before the writ of error is obtained, and supersedeas granted, that the right, title and interest of the purchaser, or purchasers, under said decree, shall not be affected, or disturbed by a reversal of said decree. This statute is conclusive of the case. And it can be of no practical importance to John Baker, that we should now reverse the decree, since the purchaser's title cannot be affected, or a re-sale ordered. There is, as to him, no other error. And if there were, it could have no affect upon Graham's title.

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The debt due complainant was finally settled in the master's report, and no exception filed by defendants. That must now be taken to be correct. The decree of the Chancellor will be affirmed.

THE STATE v. STEPHEN DILLON

CRIMINAL LAW. *An infant may be prosecutor. Act of 1801, ch. 30. Code § 5097.* By the act of 1801, ch. 30, no indictment can be presented to the grand jury without a prosecutor. By section 5097 of the Code, various exceptions are made to this requirement. But in all cases not falling within one of the exceptions made, a prosecutor is still required. An infant is not prohibited by statute, nor by public policy from becoming prosecutor, and may, therefore, be endorsed as such.

FROM OVERTON.

The defendant pleaded in abatement, that the prosecutor was an infant. The Attorney General, T. H. WILLIAMS, demurred to the plea. The Court, GOODALL, J., presiding, overruled the demurrer, and quashed the indictment. The State appealed.

SNEED, Attorney General, for the State, argued that :

The indictment in this case was quashed on the ground, that the prosecutor was a minor, under the age of twenty-one years.

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Can an infant be a prosecutor? It has never been held in this State that he cannot, and no good reason can be assigned why he should not. Such a doctrine, in many cases, would exclude him from that protection of his person, which the law guarantees to all people alike.

It has been held here, that a *feme covert* cannot be a prosecutrix. But why? because she has no separate existence—because her existence is, in legal contemplation, merged in that of her husband.

The object of a prosecutor, say this Court, is to have before the Court a responsible person, who may not only be held responsible for costs, if the prosecution be malicious or frivolous, but who may be also held amenable for the false imprisonment, &c.; and the reason this Court assigns for excluding a *feme covert* is, that she is wholly irresponsible in law for costs or damages. *Moyers v. State*, 11 Hum., 40. But an infant is responsible for costs. See the case of *Beasley v. State*, where it is said, that “our practice has been uniform in making no distinction between infant and adult defendants in respect to costs.” See act of 1818, ch. 136, § 2, cited 1 Meigs’ Dig., page 616; *Moyers v. State*, 11 Hum., 40; *Beasley v. State*, 2 Yer., 481.

J. W. MCHENRY, for the defendant, said:

The act of 1801, ch. 30, sec. 1, provides: “No State’s Attorney shall prefer a bill of indictment to any grand jury in this State, without a prosecutor marked thereon.” Is a minor a competent and legal prosecutor

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within the meaning of the foregoing act? We are not aware that this question has ever been before this Court. The object of the section quoted, say this Court, in the case of *Moyers v. State*, 11 Hum., 42, "is to have before the Court a responsible person, who may not only be held subject to the payment of costs, in the event the prosecution shall turn out to be frivolous or malicious; but who may likewise be held amenable to the injured party, for the false imprisonment or malicious prosecution." The case cited, was one where a married woman was marked as prosecutrix; but the reasoning and policy of the act would seem to apply to infants. The effects and consequences likely to be entailed on infants themselves, as well as the whole community, by holding them competent prosecutors of crime, are obvious. If a minor under twenty-one is competent, the infant of seven is likewise. If he is competent to prosecute, then he is liable to costs in the event the prosecution should turn out to be frivolous or malicious, in contravention of the general doctrine, that he is not liable for costs, and must sue by his guardian or next friend. In addition, he may be subjected to suits for malicious prosecution and false imprisonment. He may be made the dupe and the instrument of the revenge and malice of designing and corrupt men, and thereby ruined in his estate. On the other hand, the community will not be exempt from consequences of a serious character, from the deposition of the prosecuting power in the hands of infants. Their rashness and immaturity of judgment will lead them, in many cases, unadvisedly to prosecute alleged offences, not justified by the proof or circumstances of the case. In view of these *effects* and *consequences*,

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likely to result from the construction of the foregoing statute contended for by the State, we infer that infants were not embraced therein by the Legislature.

CARUTHERS, J., delivered the opinion of the Court.

The only question in this case is, can an infant be a prosecutor? The indictment was for obstructing a public road; a plea in abatement was filed, setting up the minority of the prosecutor, a demurrer to which was overruled by the Court, and judgment given for the defendant.

By the act of 1801, ch. 30, no indictment could be preferred to the grand jury without a prosecutor, but to this, various exceptions were afterwards made by the Legislature; these, by the last act, the Code, amount to twenty-one. Sec. 5097. But the case of obstructing roads is not one of them, and still requires a competent prosecutor. So if a minor cannot prosecute, the judgment must be affirmed. This question has not before come up for adjudication.

It was held, in *Moyers v. The State*, 11 Hum., 41, that a *feme covert* could not be a prosecutrix. The reason assigned was, that she was not liable for costs in case the prosecution were "frivolous or malicious," as provided by act of 1794, ch. 1, sec. 76, nor amenable to the defendant for false imprisonment or malicious prosecution. It is insisted, that the same reasons apply to a minor, and render him incompetent to prosecute. But is this so? We think not. He is liable for costs,

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and for trespass and torts. *Beasley v. The State*, 2 Yer., 481, and authorities there cited.

If then he is excluded from the right to prosecute, it is not upon the reason applicable to a married woman. As a new and open question much may be said on both sides. The considerations presented by the defendant's counsel, on the ground of policy are entitled to much weight. They have reference, Loth to his own safety, and the danger to others and the public by the presumed want of discretion and judgment in an infant. But on the other hand, as contended with great force by the Attorney General, he, more than those of mature age, needs the protection afforded by the criminal laws, for the security of his rights, both of person and property. Why should he not be allowed to call into action the power of the State to avenge his wrongs, or protect his rights, as well as others, being responsible, as well as they, for the abuse of the privilege?

As to any danger to himself or others, or to the State, that would be avoided generally by the supervision of the Attorney General and the Court.

Not being deprived of this common right to prosecute offenders, by any statute or decision, or public policy, we do not feel authorized or inclined to add this to the long list of the recognized disabilities of infancy.

The judgment will be reversed, the demurrer to the plea sustained, and the cause remanded for trial.

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CHARLES HILL v. ENOCH GEORGE.

LANDLORD AND TENANT. *Landlord's lien. Act of 1825, ch. 31. Act of 1856, ch. 77.* The lien of the landlord upon the crop raised on the premises, to secure the payment of the debt for rent, given by the act of 1825, ch. 31, is *superior* to the claim of the debtor under the laws of the State exempting certain property from execution. The act of 1856, ch. 77, is general in its terms, and does not repeal or modify the act of 1825, ch. 31, or in any way impair the lien given by that act.

FROM DEKALB.

His Hon. Judge GOODALL was of opinion, and so instructed the jury, that the *lien* of the landlord was not superior to the claim of the debtor under the exemption laws of the State. The defendant appealed.

BRIEN & COX, for the plaintiff in error.

NESMITH, for the defendant in error, argued that:

By the act of 1820, ch. 11, § 1, any officer levying upon property exempt from execution is liable to an action at the instance of the party aggrieved.

This corn was exempt from execution. Acts 1855-6, ch. 77, §§ 1 and 2. Any person engaged in agriculture, being the head of a family, shall have exempt from any execution or attachment twenty-five barrels of corn. By the 4th section of same act, all laws, and parts of laws, in conflict with the provisions of this act are repealed expressly. These acts exempting property from execu-

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tion are to be construed so as to advance the remedy the Legislature intend to afford. *Bachman v. Crawford*, 3 Hum., 213-217. That intention was to provide sustenance for the wife and children when the husband was improvident.

But it is contended for the defendant that the act of 1825 gave the landlord a lien upon the crop for the rent. Admitted. But this lien must be enforced by execution; and twenty-five barrels of corn are exempt from execution by the acts of 1855-6. And this lien of the landlord is only a lien, and gives him no property whatever in the crop. *Lawrence v. Jenkins*, 7 Yer., 494.

The Legislature only intended, by the landlord's lien law, to protect him against fraud and collusion, between his tenants and third persons. It only gives his "debt" precedence over "all other debts." "All other debts" must be collected by execution or attachment. So must this. If the act of 1825 ever gave the landlord a right to sell all the crop for the rent, which plaintiff *denies*, it is expressly repealed by the 4th section of the act of 1855-6, ch. 77; for such a law as contended for by the defendant is in direct conflict with the provisions of the act of 1855-6. See *Browning v. Jones*, 4 Hum., 69 and 72; 3 Kent, 8th edition, top page 600, marginal page 480, note *d*.

Articles necessary to prevent families from suffering are exempt from attachment, execution, distress, or other legal process. Distress is the remedy for rent in New York. The statutes of Tennessee are here referred to to show that such articles are exempt here.

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WRIGHT, J., delivered the opinion of the Court.

The question presented in this record is, whether the lien of the landlord upon the crop made on the premises to secure the payment of the debt for rent, given by the act of 1825, ch. 31, is *superior* to the claim of the debtor under the laws of the State exempting certain property from execution? It has been repeatedly held that the proper mode of enforcing this lien is by judgment and execution against the tenant by the landlord, and that it must be levied on the crop growing or made on the rented premises. *Davis v. Parks*, 6 Yer., 252-260; *Hardeman v. Shumate*, Meigs' Rep., 398-403. This was done in this case, and the proper steps taken to maintain and enforce the lien under the statute.

But it is argued for George, the tenant, that the lien does not exist between landlord and tenant, but only as between the landlord and other creditors of the tenant; and that if this be not so, still that if the tenant only have left the corn allowed him by the exemption laws of the State, the same cannot be taken to satisfy the landlord, though grown upon the rented premises.

Neither of these positions can be maintained. The statute gives the lien directly against the tenant as well as his other creditors.

It grows out of the renting, and the relation of landlord and tenant, and in the very nature of the case must be superior to the right of the tenant. The position of the tenant is, in this respect, analogous to the claim of the mechanic's lien or widow's dower, asserted

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against the lien of the vendor of real estate. Will there be no lien if the tenant raise no more corn than the law allows him? Was this the meaning of the statute? And will not such a construction operate, in fact, to the prejudice of the poor, and prevent them from so readily renting lands or getting homes?

The act of 1856, ch. 77, (Acts 1855-6, page 89,) is general in its terms, and does not, in our opinion, repeal or modify the act of 1825, ch. 31, or in any way impair the lien of the landlord under that statute. The two acts may well stand together.

Judgment reversed, and cause remanded.

WILLIAM KEARLY v. M. B. DUNCAN.

1. **WARRANTY.** *Words that amount to a warranty. Personal liability of commissioner.* The plaintiff in error sold certain slaves to the defendant in error, as commissioner under the order of the County Court. He executed to the purchaser an instrument of writing, in which he used this language: "Said negroes sound in body and mind, and slaves for life." This is a warranty of the soundness of said slaves, and renders the commissioner personally liable on said warranty.
2. **EVIDENCE.** *Parol declarations not admissible.* When a person has executed an instrument of writing, in the absence of fraud, mistake, or unfairness, parol evidence is not admissible to change his liability created by the written instrument. It must be taken to contain conclusive evidence of the final and deliberate intention and agreement of the parties.

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3. **CONSIDERATION.** If a commissioner, under an order of Court, sells slaves, and, upon receipt of the purchase money, warrants the title and soundness of said slaves, a sufficient consideration passes to support the warranty.

FROM SMITH.

This cause was tried before GOODALL, J., and resulted in a verdict for the plaintiff. The defendant appealed.

HEAD & TURNER, and FITE, for the plaintiff in error.

GUILD, STOKES, and BENNETT, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action on the case, grounded on an alleged breach of warranty of the soundness of certain slaves. The evidence of the warranty, relied on by the plaintiff, is contained in the following instrument:

“Received of M. B. Duncan, fourteen hundred dollars for negro woman Arzilla and two children, sold under decree of Court by William Kearley, commissioner and administrator of Arch'd and Margaret Rutherford, deceased; said negroes sound in body and mind, and slaves for life. This 10th of January, 1857.

“WILLIAM KEARLEY, *Commissioner.*”

Judgment was rendered in favor of the plaintiff for \$1,530, to reverse which an appeal in error has been prosecuted to this Court.

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No question is made upon the facts. The unsoundness of the slaves at the time of the sale, of a nature and degree to render them of no value, and the defendant's knowledge of such unsoundness, are sufficiently established.

The errors relied upon are supposed to be in the opinions and instructions of the Court.

1. The Court, in substance, instructed the jury, that the words "said negroes sound in body and mind," contained in the foregoing instrument, amounted to a warranty of soundness of the slaves; and that said warranty was personally binding on the defendant.

Both of these instructions, we think, are strictly correct. It was unquestionably the province of the Court to interpret the language of the instrument, and also to declare its legal effect. And, in doing so, it was proper for the Court, upon the facts of this case, to look to the face of the instrument alone. That the words of the instrument contain a clear and explicit warranty, is a proposition too plain to admit of discussion; and it is no less clear, upon a familiar, well-established principle, that the defendant is personally liable upon the warranty. Having voluntarily, in the absence of fraud, mistake, or other cause sufficient to avoid his undertaking, stipulated personally for the soundness of the slaves, though not in any wise bound to do so, he cannot escape from the legal liability thereby incurred; neither can he be heard to aver or prove an intention contrary to the plain import of the writing.

2. The Court held, that parol evidence of statements and declarations made by the defendant, or the crier, during the progress of the sale, or before the

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written instrument was executed, to the effect that the defendant was acting under the appointment of the Court; that he would incur no personal responsibility in respect to the soundness of the slaves or otherwise; that purchasers must judge for themselves, and buy at their peril; and that, shortly before the execution of said instrument, he had refused, when applied to, to make any warranty of soundness of the slaves, was inadmissible for the purpose of contradicting the terms of said instrument, and all such evidence was rejected.

In this there was no error, as was declared in the recent cases of *Bryan v. Hunt* and *Ellis v. Hamilton*, 4 Sneed, 544, 512. The conduct of the defendant is certainly rather inexplicable, from all the proof in the record.

Notwithstanding the foregoing declarations offered to be proved, it is shown in the proof, that during the progress of the sale, the defendant proposed to warrant the soundness of the slaves if the plaintiff would become the purchaser. But we attach no importance to this fact in the determination of the question. Our decision rests upon the ground, that immediately after the sale was over, and on the reception of the purchase money, the defendant voluntarily and deliberately prepared with his own hand, and delivered to the plaintiff, the foregoing instrument; and that there is not the slightest ground in the proof for any imputation of fraud, mistake, or unfairness in the entire transaction. Such being the state of the case, according to all the authorities the written instrument must be taken to contain conclusive evidence of the final and deliberate intention and agreement of the parties.

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3. It is said the agreement to warrant the soundness of the slaves was voluntary and unsupported by any consideration, and, therefore, not binding on the defendant. This is a mistaken assumption. The purchase by the plaintiff, and payment of the consideration money, was a sufficient consideration to support the agreement.

Without noticing other minor objections, we affirm the judgment.

H. WILLIAMS v. C. S. WHOPLES *et al.*

ATTACHMENT. *Deed of trust. Purchase of the trust property.* If property is conveyed by deed of trust to secure a debt, and a third person purchase said property, of the maker of the deed, subject to the trust in favor of the *beneficiaries*, such purchase extinguishes the right of the debtor, and a subsequent attaching creditor acquires no *lien* upon the property.

FROM WHITE.

This cause was heard before Chancellor VAN DYKE, who decreed for Snodgrass. Williams appealed.

SAMUEL TURNEY, for the complainant.

COLMS, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The Chancellor decreed against complainant, and in

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favor of David Snodgrass. Williams prosecutes a writ of error to this Court. The other parties do not complain. The Chancellor held, that Powers had a lien on the two wagons for \$110.00, and that Snodgrass was entitled to the residue of the proceeds of the sale. This decree is manifestly correct. The complainant, Williams, is an attaching creditor of Whoples. But prior to the filing of his bill, Powers' debt from Whoples had been secured by a deed of trust executed by him upon the wagons, and duly proved and registered, and Snodgrass had purchased of Whoples the wagons, subject to the trust, in favor of Powers, and Williams was informed of these facts.

Whoples, therefore, had no interest in the wagons upon which Williams' attachment could be fixed.

The proof as to the sale to Snodgrass, is abundant, and that Williams knew the fact when he filed his bill.

We affirm the decree.

E. L. GARDENHIRE v. SIMEON HINDS.

1. **HUSBAND AND WIFE.** *Marital rights of the husband. Deed of settlement and will. Construction.* Property was conveyed to the trustee in trust, that he should "hold the above described negro girls, slaves, as aforesaid, and the increase of the said girls, to the sole and separate use and benefit of the said Margaret Hinds, and her heirs forever, to enjoy the possession and profits of the above named girls and their increase, to her and their own, and sole and separate use and benefit forever." Property was also devised to said trustee, for the benefit of the daughter, that "she and her heirs are to be per-

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mitted to use and enjoy the rents, profits, and emoluments of the said land, and the profits and increase of the last aforesaid negroes, forever." It is held, that by the true construction of both the deed and will, the marital rights of the husband are excluded altogether in favor of the "heirs," that is, the blood relations and next of kin.

2. **TRUST AND TRUSTEE.** *Continuation of the trust. Construction. Separate use.* The exigencies of the trust created by the deed and will require, and such was the intention of the father, that the trust should be extended after the death of Margaret Hinds, that her heirs may be permitted "to enjoy the rents and profits, and emoluments of the land, and the profits and increase of the negroes." The heirs might be daughters, in which event the donor and testator continue the separate estate, and for this purpose the trust is still necessary.
3. **DESCENT AND DISTRIBUTION.** *Father next of kin to child dying intestate, without issue.* The father is the next of kin to a child dying intestate, without wife or issue surviving, and succeeds to his personal estate.
4. **PARENT AND CHILD.** *Care and custody of the child.* If the child is a female, of frail and unhealthy constitution, only eight years of age, has been raised principally by the grandmother, who is eminently fit and able to raise her in a proper manner, and is willing to do so free of charge, the Court will give to the grandmother the care and custody of such child, in preference to the father, who has no wife or home, and whose means to educate her are limited

 FROM OVERTON.

Original and cross-bills were filed, and the causes were finally heard at a Special Term of the Chancery Court, held in November, 1857, before Chancellor VAN DYKE. The defendant, Hinds, appealed.

McHENRY, MURRAY, and EWING & COOPER, for the complainant.

M. M. BRIEN and DENTON, for the defendant.

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WRIGHT, J., delivered the opinion of the Court.

In this cause it is clear, that the claim set up by the defendant, Hinds, that he, or his wife Margaret, acquired a title to the slaves Melia and Betsy, by the statute of limitations, cannot be maintained. They were married in 1843 or 1844, and in one of those years obtained possession of these slaves from Adam Gardenhire, her father. And it is manifest, from a reading of this record, that he made no gift of them, either verbal or written, until the deed of the 15th of April, 1845.

Till then, she held them merely upon a *loan* from him; and her possession and that of her husband, were in subordination to Adam Gardenhire's title. The deed was proved and registered, and we are satisfied they had actual knowledge of it, and recognized it as valid, and ever afterwards held the slaves under it. The case of *Gilliam et als. v. Spence*, 6 Hum., 160, is a direct authority upon this question.

The case then, as to these two slaves and their increase, must be decided alone upon the deed of the 15th of April, 1845, What are the rights of the children of Margaret Hinds and of her husband, the defendant, under that deed?

That she took an estate for her sole and separate use, and that he had, and could have no interest in, or right to this property during the coverture, cannot be controverted.

The conveyance made by the donor, was to E. L. Gardenhire, his son, in trust, that he should "*hold* the above described negro girls, slaves as aforesaid, and the

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increase of the said girls, to the sole and separate use and benefit of the said Margaret Hinds, daughter of him, the said Adam Gardenhire; and shall suffer the said Margaret Hinds and her heirs forever, to enjoy the possession and profits of the above named girls and their increase, to her and their own, and sole and separate use and benefit forever."

This language undoubtedly gave her a separate estate, and excluded the marital rights of the defendant during the coverture. Clancy on Rights, 262 and 263.

But she has died, leaving children, and leaving him her survivor, and the real contest is between these children and him. Can they be allowed to take, in any way, under this deed; and were his marital rights cut off, not only during the coverture, but after his wife's death, so that as husband, he can not be permitted to acquire this property, but its ownership must devolve upon them as her blood relations and next of kin?

This question has much of difficulty in it. But when we consider the entire instrument and take into consideration the facts of the case, and the state of the donor's family at the time the deed was made, and to which we suppose it proper to look; (*Jones v. Jones*, 2 Dev. Eq. Rep., 387,) the opinion to which we have come, is, that it was the donor's intention to exclude the defendant, as husband, not only during the marriage, but after his daughter's death.

The intention to exclude him must be clear, or it cannot be done. But this intention may exist and be shown, not only in a deed made by him, but in a deed or will made by another. *Hamrico v. Laird*, 10 Yer., 222, and *Ware et al. v. Sharp*, 1 Swan, 489, establish

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this. Nor is it necessary, in order to exclude him, that we should show his wife had only a life estate in the property. He may be excluded where she has the entire estate. 10 Yer., 222; 1 Swan, 489. Judge Green says, "But our present inquiry is as to the intent of the settler, as to the marital rights of the husband, for if that intent be to exclude him altogether, it is a matter of no concern whether the wife took the entire estate, or only a life estate."

The language of this deed is striking and peculiar. The trustee shall "suffer the said Margaret Hinds and her heirs forever, to enjoy the possession and profits of the above named girls and their increase, to her and *their own and sole and separate use and benefit forever.*" He evidently here looked to a period beyond Margaret Hinds' death; and that the trustee should hold this property for a class of persons whom the donor designated as her "heirs," that is her next of kin or blood relations. That this was the actual meaning of the donor individually, we have no doubt. And that this interpretation may be given to an instrument like this, in order to exclude the marital rights of the husband, is shown by *Ware et al. v. Sharp*, 1 Swan, 489, and *Sugg v. Tyson*, 2 Hawk's R., 472.

Indeed it is difficult to distinguish these cases, in principle, from the present.

That the husband is not the heir or next of kin of the wife, has been repeatedly settled. 2 Hawk's R., 472; 1 Swan, 489.

The appointment of a trustee, though not conclusive, is a circumstance not to be overlooked. 1 Swan, 128; 6 Hum., 487.

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We are also of opinion, that, as to the property devised and bequeathed to E. L. Gardenhire, in trust for Margaret Hinds and her heirs, in the sixth clause of Adam Gardenhire's will, the marital rights of defendant must, upon the same authorities, be held excluded. That she had a sole and separate estate during the coverture, seems clear. The words, "she and her heirs are to be permitted to use and enjoy the rents, profits and emoluments of the said land, and the profits and increase of the last aforesaid negroes, forever," appear, upon authority, to have this effect; and it is useless to consider other expressions and words, leading to the same result.

In *Tyrrel v. Hope*, 2 Atk., 558, Lord Hardwick held, that a promise in writing by the intended husband to his intended wife, that "she should enjoy and receive the issues and profits of one moiety of the estate then in the possession of her mother, after the decease of her mother," gave the wife an estate to her separate use. He said the note could bear no other construction, although the words "separate use" were not to be found in it; for to what end should she receive the rents and profits, if they become the property of the husband the next moment? And he added, that the word "enjoy" was very strong to imply separate use. 2 Atk., 558; Clancy on Rights, 263.

And in looking at this will in the light of the circumstances under which it was made, we are constrained to come to the conclusion, that the testator intended to exclude the defendant's marital rights altogether, in favor of the heirs; i. e., the blood relations and next of kin

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of Margaret Hinds. 1 Swan, 489; 2 Hawk's R. 472; 6 Hum., 487.

He had gone off, and had been gone for years, had, in effect, abandoned his wife and children, when the will was made. They had lived with the testator, and been supported by him for years, the defendant being improvident and insolvent. The children of the testator's daughter were very young and frail in health, and therefore very dependent. It was questionable whether the defendant was disposed to aid them, and if so disposed, whether he could be of any service to them. It is manifest, that while the testator was attached to his daughter and her children, he had little confidence in the defendant.

How natural then, that he should provide for her and her offspring. And how unreasonable to believe for a moment, that he intended the defendant to have this estate after his wife's death.

To carry out his purposes, the testator devises the property to his son, the complainant, in whom he had full confidence as a trustee for his daughter Margaret and her heirs, and requires that he shall see that she and they shall "use and enjoy the rents, profits and emoluments of the said land, and the profits and increase of the last aforesaid negroes, forever."

We cannot but regard this language, as well as the whole scope of the devise, as in restraint of the marital rights. It is purely a question of intention. And we are permitted, in order to reach it, to look at the common meaning of the word *heir*. The husband is neither heir or next of kin to his wife; he answers not the description used, *heirs of the wife*; for though,

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in determining the *quantity* of an estate, the word *heirs* would be received as a word of expansion or limitation, and the same force allowed it, as if the words executors and administrators had been used, yet in arriving at the *intent*, the Court will consider the common meaning of the word *heir*, though it be a technical word; and, as here it was not used technically because applied to *personalty*, it shall be taken to mean blood relations on whom the law casts the inheritance on the death of the ancestor, and is the same with next of kin.

These principles, and the result to which we have arrived, will, we think, be found sustained by the cases in 2 Hawk's and 1 Swan, to which we have already referred. That we have reached the actual intent of Adam Gardenhire, we have no doubt. This intent should be maintained wherever it can be upon reason and authority.

We are furthermore of opinion, that the trust estate of complainant did not terminate with the death of Margaret Hinds, but that the exigencies of the trust required, and such was the intention of Adam Gardenhire, that it should be extended after her death, so as to protect this estate for her children.

In the deed it is provided that he "shall suffer the said Margaret Hinds and her heirs forever, to enjoy the possession and profits to her and *their own* sole and separate use and benefit forever." The heirs might be daughters, in which event the donor continues the separate estate, and for this purpose the trust is still necessary.

And in the will the provision is, "that she and her

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heirs are to be permitted to enjoy the rents and profits, and emoluments of the land, and the profits and increase of the negroes."

This language implies the continuance of the trust estate. It is not like the case of *Ellis v. Fisher*, 3 Sneed, 231, where the property was to vest in the heirs after the death of the first taker. It was just as necessary, and perhaps more so, to protect this estate after the death of Margaret Hinds against the possession and wasteful habits of defendant, as it was before. Of this, the donor and testator was conscious. And we think it was his intention that his son should still be continued the trustee, notwithstanding Margaret Hinds' death.

Lucien B., one of the children, died in infancy, after the death of its mother. The Chancellor decreed its share in the personal estate, to the defendant, as its father and next of kin. This we think was proper.

We also think the Chancellor acted right in decreeing the custody and education of the child Valeria, to its grandmother, Alice Gardenhire. The circumstances of the case, and the interest and welfare of the child, as gathered from this record, demonstrate the correctness of this decree on this branch of the case. *State v. Payne*, 4 Hum., 523; 2 Kent, 193-194; 1 Madd. Ch. Pr., 332-333.

The child is a female, of frail and unhealthy constitution, only eight years of age. She has been principally raised by the grandmother, who is shown to be eminently fit and able to raise her in a proper manner, and is willing to do so free of cost. The child and the grandmother are devotedly attached to each other, and it is shown that the defendant, as her father, can

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have free and unrestrained access to her. He has no wife or home, and his means to educate her are limited. From these and other facts in this record, we cannot hesitate in awarding to the grandmother the possession of the child.

The decree of the Chancellor is, in all respects, affirmed. The costs of this Court will be paid by the defendant.

JAMES INGRAM *et al.* v. HENRY F. SMITH *et al.*

1. **WILL. Construction. *Per stirpes* and *per capita*.** The testator's will contained the following clause: "I give and bequeath to my daughter, Tracy Spicer, during her natural life, two negroes, Daniel and Hasty, which negroes, after her death, and the death of her husband, I give, to be equally divided between the heirs of my son Jesse, and daughter Polly Ingram." By the proper construction of this clause, the remainder created goes equally to the heirs of the son and daughter named, who take *per capita*, and not *per stirpes*.
2. **SAME. Same. Persons answering the description at the time the right accrues will take.** In order to give effect to the bequest to the heirs of the son and daughter, it is not necessary that they should have had children at the time of the execution of the will. It is sufficient, and the bequest is valid, if there are persons to answer to the description when it is to take effect.
3. **STATUTE OF LIMITATIONS. Possession as between bailor and bailee. Rule in North Carolina.** The transactions involved in this suit were in North Carolina, and the rights of the parties are governed by the laws of that State. It is settled there, that if a parent puts property in the possession of a child who has left, or is about to leave the parent, such property is presumed to be given and not loaned to the child; and purchasers and creditors can subject it to their claims, whatever may have been the private understanding of the parties. But this is a presumption of fact and not of law. Therefore, between the parties and all others who cannot impute either legal or actual fraud to the transaction, the true character of the act may be shown. And if the loan is established as a matter of fact, the statute of limitations will operate upon the husband's possession, although he had sold some

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of the negroes as his own, and notwithstanding his declarations that he held for himself. He cannot, by his own act, throw off his character of bailee.

4. **EVIDENCE.** *Chancery practice. Exceptions to evidence and exhibits.* Objections made to the reading of evidence and exhibits in the Court below must be clear and specific, that the opposite party may have the opportunity of curing the defect, if it be one, and not be taken by surprise when that opportunity can no longer be had.
5. **SAME.** *Same. Same. Case in judgment.* The bill of exceptions shows, that the copy of the will was objected to on the trial "because not authenticated according to law," and "because the said paper had not been filed in Court according to law." The precise character of the objections is not stated, but in argument it was urged that the certificate of the clerk is insufficient for want of a seal, and the exhibit was filed during the term at which the cause was tried, and without the one day's notice required by the 19th rule of Chancery Practice. Held, that the objections are not sufficiently specific—that it does not appear that either of them were made, or could have been made, in the Court below, and they cannot avail the party in this Court.
6. **SAME.** *Same. Admissions in the answer.* If an exhibit is objected to as evidence, and the objection erroneously overruled in the Court below, yet, if the material part of said exhibit is copied into the answer, and admitted to be true, the objection cannot avail the party, as he is bound by his answer.
7. **SAME.** *Witness. Competency. Release.* The husband and wife, who have conveyed slaves, are incompetent witnesses in a contest between the purchasers from them or their assignees, and remaindermen, unless a release is given them. Such release, to be effectual, must be executed by all the parties in interest, or by all who may have a claim upon them upon their covenants. A release by a portion of the parties will not render them competent.
8. **CHANCERY PRACTICE.** *Decree for defendants.* It is the settled law of the Court of Chancery that a decree may be made between co-defendants, grounded upon the pleadings and proof between the complainant and defendants, and founded upon and connected with the subject matter in litigation between the complainant and one or more of the defendants. Such decrees are made to prevent a multiplicity of suits.

FROM WILSON.

This cause was heard before Chancellor RIDLEY, at the January Term, 1858. The defendants appealed. The facts are fully stated in the opinion of the Court.

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STOKES, MARSHALL, GOLLADAY, and TARVER, for the complainants.

J. S. BRIEN, EWING, MARTIN, and GUILD, for the defendants.

W. F. COOPER, special J., delivered the opinion of the Court.

The original bill in this case was filed on the 5th day of February, 1848, by Samuel Ingram and others, the children of Polly Ingram, against Alfred McClain, Joseph Smith, J. M. Smith, and Henry F. Smith, to attach certain slaves in the possession of the defendants, and to have the complainants' rights therein declared and protected. The bill states that the complainants claim under the will of Samuel Deloach, of Johnston county, in the State of North Carolina, bearing date the 29th day of October, 1805, and duly proved and admitted to record in the Probate Court of said county after his death. That complainants have a duly certified copy of said will in Arkansas, where they reside, and will file the same as soon as it can be done in this cause. That the testator, by his said will, bequeaths two negroes, Daniel and Hasty, to his daughter Lucretia or Tracy Spicer, for life, and, after her death and that of her husband, Wm. Spicer, to be equally divided between the heirs of the testator's daughter, Polly Ingram, and of his son, Jesse Deloach. The bill further alleges, that Wm. Spicer and his wife Tracy are still living. That some years before Wm. Spicer had sold the negro woman Hasty to George Smith, who purchased with a

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knowledge of complainants' rights; that George Smith had since died; that the defendant, Henry F. Smith, had Hasty and several of her descendants in his possession; that defendant, Joseph Smith, had Emeline, a daughter of Hasty, in his possession; that Jas. M. Smith had Lewis, a son of Hasty, in his possession; and that Alfred McClain, had Judy, another daughter of Hasty, and several children of Judy, in his possession. The bill prays that the negroes be attached, that defendants be enjoined from removing or disposing of them, that complainants' rights in remainder be declared, &c.

The defendants, McClain and Henry F. Smith, file separate answers, in which each admits that he has seen a paper purporting to be a copy from the records of the County Court of Johnston county, North Carolina, of the last will and testament of Samuel Deloach, deceased, bearing date the 29th of October, 1805, and containing a clause, quoted in the answers, which is identical with the clause of the will under which complainants claim, as hereinafter given, except that the name of Hester is applied to one of the negroes instead of Hasty. Both answers further admit that the said copy purports to be duly certified by the clerk of the County Court of Johnston county, North Carolina, and that the defendants "suppose the will was duly proven and admitted to record." The answers further admit that George Smith purchased from Wm. Spicer, about the year 1820, the woman Hasty, and perhaps two children. That George Smith died about 1833, and Hasty and her increase were divided among his distributees. Alfred McClain admits that he is in possession of Judy, a daughter of Hasty, and her children, having purchased

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them from his co-defendant, James M. Smith, to whom they had been allotted in the distribution of George Smith's estate. Henry F. Smith admits that he is in possession of Hasty and nine of her children. Hasty and three of her children he bought from Ross Webb, the husband of his sister Martha Smith, to whom they had been allotted in the division of George Smith's estate. One of Hasty's children he bought from Samuel Smith, his brother, to whom he was allotted. The other children were born after he bought Hasty. Both of these defendants insist that Wm. Spicer acquired a title to the negroes Daniel and Hasty, by gift from Samuel Deloach, of Jenny, the mother of said Daniel and Hasty, or by virtue of the statute of limitations, operating on the possession of said Jenny before the will of 1805 was made, and that, consequently, no right to such slaves passed under the will. Both defendants also deny that George Smith purchased with knowledge of complainants' claims—Henry F. Smith stating that he was present when his father made the trade. Both defendants also insist that all necessary parties are not before the Court. That the heirs of Jesse Deloach should be made parties. And for the omission to do so, they claim the same benefit as if the objection had been made by demurrer.

The defendant, James M. Smith, files an answer denying that he has them, or ever has had the slave Lewis in his possession; and no further proceedings are had against him. No proceedings seem to have been taken at all against Joseph Smith. But on the 27th day of April, 1849, the complainants file an amended bill against Wm. H. Evans, charging that he has Em-

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eline, a daughter of Hasty, in his possession. Evans answers, and admits that he claims the negro Emeline, in right of his wife, who acquired her as one of the children of James Williamson, deceased, who acquired his claim in right of his wife, as one of the children and distributees of George Smith, deceased, and in the division of the negroes belonging to that estate. The answer further admits, that "since the filing of the bill respondent has understood that said Emeline is a daughter of a woman named Hasty, who belonged, or was claimed to belong, to the estate of the late George Smith, deceased." He denies all personal knowledge of other matters alleged in the bill, but refers to and adopts the answers of McClain and Henry F. Smith.

On the 1st of March, 1852, upon an order of the Court to that effect, the complainants file an amended and supplemental bill "against the children and heirs of Jesse Deloach, to wit, Samuel Deloach, John Deloach, Wm. Deloach, and C. Deloach, of Adams county, Mississippi." The bill adds: "There may be other children of said Jesse, whose names and particular residences are unknown to complainants; but the above named are all complainants can get any certain knowledge of." The bill prays the Court "to cause the children and heirs of the said Jesse Deloach to be made defendants; that publication be made as provided by the rules of this Court in case of non-resident defendants, and that the relief sought in the original bill be granted." At the April Rules, 1853, a *pro confesso* order was taken in the master's office, "as to the defendants, heirs of Jesse Deloach," reciting that publication had been regularly made as to them.

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On the 18th of June, 1856, the complainants file another amended and supplemental bill against Henry Smith, George K. Robertson, administrator of Alfred McClain, deceased, and Wm. H. Evans, in which they allege the filing of the original bill, and of the amended bill "for the purpose of bringing before the Court the children and heirs of Jesse Deloach, who are interested in the remainder in said slaves;" and add: "This amended bill not having been answered, has been regularly taken for confessed." The bill proceeds to state that Wm. Spicer and wife have recently departed this life, and that complainants are now entitled to the negroes in dispute, and prays that the parties above named be made defendants, and required to answer. Each of these defendants does answer, admitting the filing of the original and amended bills as stated, and for the purposes alleged, admitting the death of Spicer and wife, and referring to and relying on the former answers.

Proof was taken on both sides, and the cause was finally heard by Chancellor RIDLEY, at the January Term, 1858, of the Chancery Court at Lebanon, who gave a decree in favor of complainants, and ordered the defendants, Smith, Robertson administrator, and Evans, to deliver the negroes in their respective possession to the clerk and master of the Court, and directed an account to be taken of the hire since the death of Spicer and wife; from which decree the defendants Smith, Robertson administrator, and Evans prayed and obtained an appeal to this Court.

The complainants claim under the will of Samuel Deloach. The will, as has been stated, was not before

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the draftsmen of the bill when drawn; but the complainants undertake to file a certified copy as soon as it can be done. The transcript of the record before us contains a copy of said will immediately following the original bill, and marked as exhibit, A, thereto. This copy is duly certified by the clerk of the Court of Pleas and Quarter Sessions of Johnston county, North Carolina, purporting to be "under his hand and seal of office," although no scroll or seal appears in the transcript. The authentication of the clerk is accompanied by the certificate of the chairman of the Court of Pleas and Quarter Sessions, to the official character of the clerk, and the faith and credit due to his official acts; and this, again, is followed by the certificate of the clerk to the official character, &c., of the chairman. These certificates bear date the 7th and 8th of May, 1848. At the hearing of the cause before the Chancellor, the defendants objected to the reading of the copy of the will in question, "because not authenticated according to law," and "because the said paper had not been filed in Court according to law." The Chancellor overruled the objections, and permitted the copy to be read, and the defendants tendered their bill of exceptions, which was signed accordingly. The objections are manifestly too general, and cannot avail the defendants under the rulings of this Court. It has been repeatedly held, that the objections made to the reading of evidence and exhibits in the Court below must be clear and specific; and this, for the obvious reason that the opposite party may have the opportunity of curing the defect if it be one, and not be taken by surprise when that opportunity can no longer be had. It is now urged that the certificate of

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the clerk is insufficient for want of a seal, and that the exhibit was filed during the term at which the cause was heard, without the one day's notice required by the 19th Chancery Rule. It does not appear from the bill of exceptions that either of these exceptions was made, or could have been made, in the Court below. Neither objection can now avail without showing, by bill of exceptions, that it was distinctly taken in the Court below; and the absence of the seal in the transcript must be considered as a mere clerical omission. Moreover, under the pleadings and proof, the defendants would not be benefitted by the exclusion of the copy of the will objected to. The answers, as we have seen, admit the existence of the will of Samuel Deloach, "duly proved and admitted to record," and that it contains a clause identical with that upon which the complainants rely, except that one of the negroes therein mentioned is designated by the name of Hester instead of Hasty. The proof is conclusive that the testator had no such slave as Hester, and that the negroes devised to his daughter Tracy were the two children of Jenny, as to whose names there is no discrepancy in the testimony. The defendants themselves admit that Hasty was the daughter of Jenny, and insist that Wm. Spicer, under whom they claim, had a good title to Hasty, by virtue of a gift to him of Jenny, by Samuel Deloach. We have no doubt, therefore, that these preliminary objections are merely formal, and do not affect the merits of the controversy.

The clause in Samuel Deloach's will upon which the complainants rely, is as follows:

"I give and bequeath to my daughter Tracy Spicer,

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during her natural life, two negroes, Daniel and Hasty, which negroes, after her death, and the death of her husband, I give to be equally divided between the heirs of my son Jesse and daughter, Polly Ingram."

The first objection made to the complainants' claim under this clause, is, that Daniel and Hasty were the children of a negro slave named Jenny. That Jenny had been given to Wm. Spicer and wife many years before the making of this will; that Spicer had acquired a title to Jenny, and had actually sold her before the will was made; and that the testator had, in fact, no right to Jenny's children when he thus undertook to bequeath them.

On the other hand, it is insisted that Jenny was not given, but only loaned to his daughter by the said Samuel Deloach, and that no length of possession by the husband and wife, under the laws of North Carolina, would turn the loan into a gift. That the sale of Jenny was with the assent of the testator, and that the testator did actually own Daniel and Hasty at his death. These occurrences having all taken place in the State of North Carolina, among parties then living in that State, the rights of the parties must depend upon the local law applied to the facts as developed in the record. The questions of law involved have been repeatedly passed upon by the Courts of North Carolina, and are not, in reality, seriously controverted.

"It has long been settled," says HENDERSON, J., in *Collier v. Poe*, 1 Dev. Eq., 56, "by the decisions of our Courts, that if a parent puts property into the possession of a child who has left, or is about to leave the parent, such property is presumed to be given, and

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not loaned to the child, and, therefore, purchasers and creditors have subjected it to their claims, whatever may have been the private understanding of the parties. *But this is a presumption of fact and not of law.* Clearly, therefore, between the parties, and all others who can not impute either legal or actual fraud to the transaction, the true character of the act may be shown." It was also held in that case, that if the loan was established as a matter of fact, the statute of limitations would not operate upon the husband's possession, although he had sold some of the negroes as his own, and notwithstanding his declarations that he held for himself. He could not, by his own act, throw off his character of bailee. These principles have been repeatedly laid down by the Court of last resort in North Carolina, upon parol bailments of slaves, prior to their act of 1806. *Mitchell v. Cleves*, 2 Hay., 126; *Dameron v. Clay*, 2 Dev. Eq., 17; *Hill v. Hughes*, 1 Dev. & Bat. L., 336; *Green v. Harris*, 3 Ire. L., 210. Accordingly, a continuous possession by the husband of twenty years in *Collier v. Poe*, and of over forty years in *Green v. Harris*, was held insufficient to vest title in him, although, in each case the husband publicly claimed the negroes, and disposed of some of them. An actual demand by the bailor, and a refusal by the bailee, was considered necessary to establish an adverse holding upon which the statute of limitations could operate.

With these principles before us, there can be little difficulty in settling the rights of the parties upon the facts of this case. It is shown that Wm. Spicer intermarried with Tracy Deloach, then only fourteen years of age, about the year 1790, against the wishes of the

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father, Samuel Deloach, and by a clandestine marriage. Spicer and wife resided, after the marriage, in the same county with Samuel Deloach, and a few miles distant. Deloach seems never to have had any friendly feelings for his son-in-law, who was inclined to be dissipated and improvident. But not long after the marriage, the negro Jenny, then a small girl, was delivered into the possession of Tracy Spicer by her father, and carried home by her. Jenny remained in the possession of Spicer and wife until she had three children, Daniel, Hasty, and Sarah. Some eight or nine years after the marriage, Deloach moved to Johnston county, some eighty miles from his former residence. In 1804, Wm. Spicer sold Jenny and her youngest child, Sarah, to one Bryant, and purchased a small tract of land with the proceeds. After Deloach's removal to Johnston county, it appears from the testimony of at least one witness on behalf of the complainants, and one on behalf of the defendants, that Daniel and Hasty were, for a short time, in the possession of Samuel Deloach, and were again brought back by Mrs. Spicer. The will was made on the 29th of October, 1805; shortly after which the testator died. About the year 1810, Spicer and wife removed to Wilson county in this State, where they continued to reside up to their death. They brought with them Daniel and Hasty, and retained them and Hasty's increase until the sale of Hasty and her children to George Smith, about 1820, and of Daniel to one McGregor, about 1827.

There is no proof as to the circumstances of the delivery of Jenny to Tracy Spicer by her father, except the testimony of Tracy Spicer herself and her hus-

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band, Wm. Spicer. Their depositions were taken in behalf of the defendants, and are excepted to by the complainants upon the ground of the incompetency of these witnesses to testify. It is conceded by the defendants' counsel, that these witnesses would be incompetent under the decisions of this Court (*Burke v. Clarke*, 2 Swan, 310) without a release; but it is insisted that sufficient releases have been executed, and they refer to the releases of Henry F. Smith, A. McClain, and Ross Webb, exhibited in the transcript. It is very obvious, however, from the recital of facts already given, that these releases are not sufficient. There is no release from the defendant, Wm. H. Evans, who has one of the slaves in his possession, nor from some of the distributees of the estate of George Smith, deceased, who received Hasty and some of her children as such distributees; nor from the personal representative of George Smith. If it were necessary, therefore, we should be compelled to hold that the witnesses were not competent, and to exclude their testimony.

In truth, however, upon a careful examination of the depositions of these witnesses, we are satisfied that they make out a case in favor of the complainants, and render that clear, which, in the absence of their evidence, would be somewhat doubtful.

Both of these witnesses state roundly, upon their examination in chief, that the negro, Jenny, was given to them by Samuel Deloach, shortly after the marriage, and that they continued ever afterwards to claim them as their own. But both witnesses, upon cross-examination, state facts which demonstrate the incorrectness of their previous mere conclusion. Wm. Spicer

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states distinctly that he was not present when the negro, Jenny, was delivered to his wife, and that he never had any conversation with Deloach about the girl Jenny, either before or after such delivery. He further admits, that when he sold Jenny to Bryant, he gave him a bill of sale; but Bryant having heard that there would be a dispute about it, he went to see old man Deloach, who signed the bill of sale. Mrs. Spicer testifies that when her father delivered Jenny to her, "he told me to take the girl, go along home with her, and make her wait upon me." This is the only proof of a gift in the entire record; and it is hardly necessary to say that such language would not constitute an absolute gift of the title of a slave under any system of laws, and certainly not under the North Carolina decisions. Nor is there any evidence to show acts of ownership, on the part of Wm. Spicer, with the knowledge of Deloach, inconsistent with the title of the latter, except the sale of Jenny and her youngest child Sarah, to which he gave his express assent, doubtless for the reason that the proceeds were to be invested in a tract of land, as a home for his daughter. The discrepancies in the testimony of Spicer and wife, and the positive proof of numerous witnesses contradicting them in material points, satisfy us that little weight can be given to their statements. But, upon the point as to whether the slave Jenny was given or loaned, we have no hesitation in saying that the facts deposed to by them constitute only a loan, and that they state no other facts inconsistent with a continuation of the relation of bailor and bailee up to the death of Samuel Deloach.

Excluding the depositions of Spicer and wife, the

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evidence is entirely satisfactory that the negro Jenny was received and held as a loan. At least one witness on each side establish the fact that the possession of the negroes was resumed by Samuel Deloach shortly before his death, doubtless for the purpose of establishing his ownership. The evidence is conclusive that, after the removal to Tennessee, Spicer and wife repeatedly and almost invariably, when the subject was mentioned in their presence, admitted that they had only a life estate. It is in proof by one witness that he read over to them Deloach's will, including the clause upon which the complainants' rights depend, and they did not deny its validity. It is, also, very conclusively shown that the fact was generally known in Wilson county that they had only a life interest, and that George Smith, who was a constable in the county, was aware of the fact at the time of his purchase. In fact it was admitted by counsel that the defendants could not protect themselves under the plea of a *bona fide* purchaser for value and without notice, even if this were a case for the application of the principles. Upon the whole, we are very clear that the title to Daniel and Hasty was in Samuel Deloach at his death, and, consequently, that the legatees in remainder took a valid interest under the clause quoted.

It is argued on behalf of the defendants that the will gives the remainder in the negroes to Polly Ingram, and not to her heirs, in connection with the heirs of Jesse Deloach. No authority is referred to in support of this construction, nor can any, we presume, be found. The intention of the testator is too clear to admit of doubt that the remainder should go equally to the heirs of his son

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and daughter named. Similar clauses have repeatedly come before the Courts, and particularly the Courts of North Carolina, and have always been so construed. *Buellock v. Bullock*, 2 Dev. Eq., 307; *Ward v. Stowe*, 2 Ib., 309; *Seay v. Winston*, 7 Hum., 472.

It was, also, urged in argument, that the bequest was not effective, inasmuch as it did not appear that either Jesse Deloach or Polly Ingram had any children at the date of the will; that an examination of the authorities would show, that whenever the word heirs was construed in such cases, to mean children, it would be found that there was a child in existence at the date of the will to answer the description. No authority was cited to sustain the distinction suggested, nor do we see, that either in principle or upon authority, the existence of children at the time of the execution of the will, is at all material, if there are persons to answer the description when the bequest is to take effect. Besides, even if the rule were as contended for, it would not alter the result. It might be conceded, that in order to construe the word "heirs," as meaning children, a child must be in existence when the will is made, yet the only effect would be, in the absence of such child, to construe the word heirs, as meaning heirs proper as to realty, and next of kin as to personalty; and then, if children were in existence when the bequest took effect, they would take as such heirs and next of kin. The word heirs, as was decided by this Court in *Ward v. Saunders*, 3 Sneed, 387-391, "is flexible, and may mean next of kin, or heir at law, according to the nature of the property given." To the same effect are the North Carolina authorities. *Simms*

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v. *Garrot*, 1 Dev. and Bat. Eq., 393; *Bryant v. Scott*, *Ib.*, 156. These authorities also hold, that a bequest of slaves to A for life, with remainder to the lawful heirs of B, when it appears from the will that B is living, is tantamount to a bequest to the children of B; and is to be divided among those who shall be *in esse* at the death of the first taker. See also, *Tourdan v. Greer*, 2 Dev. Eq., 270. It appears from the will of Samuel Deloach, that both Jesse Deloach and Polly Ingram were then living, for specific bequests are given to each. It is, also, now definitely settled in that State, after some conflict among the cases, that in a bequest, as in this cause, to the heirs of two persons, the persons answering the description when the bequest takes effect, take *per capita*, and not *per stirpes*. *Bryant v. Scott*, 1 Dev. and Bat. Eq., 156; *Ward v. Stowe*, 2 Dev. Eq., 509. These conclusions are in consonance with general rules of construction, and with our own cases.

There remains only one point to be disposed of. It is insisted, that the relief granted in this case can only extend to the complainants, and cannot include the defendants, the heirs of Jesse Deloach. We do not think so. It is the settled law of the Court of Chancery, that a decree may be made between co-defendants, grounded upon the pleadings and proof between the complainant and defendants, and founded upon, and connected with the subject matter in litigation between the complainant and one or more of the defendants; and it is the constant practice of the Court to make such decrees, to prevent multiplicity of suits. *Chumley v. Dunsanay and others*, 2 Sch. and Lef., 710; *Elliott v. Pell*, 1 Paige,

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268; *Gentry v. Gentry*, 1 Sneed, 87. The fact that the defendants, on whose behalf the decree is sought, have been brought before the Court by publication, can make no difference. The mode in which parties are brought into Court, is regulated by the law of every country, and within the territorial jurisdiction of that country, the decree will be effectual. Whatever may be the extra-territorial effect of the decree, the parties who are actually, in the eye of the law, in Court, must have their rights acted upon. This is more particularly the case when, as in the present instance, the defendants are jointly interested with the complainants in personal property, the subject matter of the litigation. The original defendants very properly objected to the want of proper parties, because the heirs of Jesse Deloach were not before the Court, and they cannot now be heard to say that the rights of these parties, brought in at their own instance, shall not be acted upon.

It is suggested that the heirs of Jesse Deloach may have renounced their right under their grandfather's will to these negroes, or may not now choose to claim them. If the renunciation referred to, had been made, the defendants in possession of the negroes, were at liberty to shew it, and would have had all the benefit, as upon a personal service of process upon the children of Jesse Deloach. If the said children decline to come forward and take any benefit under this decree, it will unquestionably inure to the benefit of their co-defendants. The complainants are only entitled with the children of Jesse Deloach, to an equal division *per capita*, of the negroes. If any child declines or fails to take his share, it will remain with the defendants now in possession. It ap-

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pears from the amended bill of the complainants, filed to bring the heirs of Jesse Deloach before the Court, that all of these heirs are probably not named. Under the construction put upon this will in the Chancellor's decree, and in this opinion, it is not possible to ascertain the precise interest of the complainants, without first ascertaining the number of the heirs of Jesse Deloach entitled to take at the death of the tenants for life. In this view, it will be necessary to modify the decree of the Chancellor, and remand the cause for further proceedings.

The children of Jesse Deloach and Polly Ingram, living at the death of the last surviving of the tenants for life, will take the slaves in dispute *per capita*. They will be entitled to a division of the slaves, if it can be made among them. If not, the parties would be entitled to a sale for division. Should the children of Jesse Deloach fail to come forward and claim their share of the negroes, and should a division of the negroes be impracticable, we think it would be proper and just to ascertain, by reference to the master, the interest of the complainants in the negroes held, by each of the defendants, and to allow such defendant to pay the same into Court, or secure the same to be paid in such time as might be deemed reasonable, and to vest the defendants with a good title to the interests thus paid for. The defendants in possession of the slaves, must account for hire since the complainants' rights accrued, upon the principles here laid down, all proper allowances for taxes, medical bills, &c., being made them. The entire costs of the cause will be paid out of the hire as aforesaid, the appellants and their sureties, in the mean-

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time, paying the costs of this Court, for which they shall be allowed a credit in taking the account ordered. With these modifications, the decree of the Chancellor is affirmed.

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STAYOR. *Written authority to the justice. Estoppel by deed.* If a party authorize a justice to enter his name as stayor to certain judgments, by an informal instrument of writing which does not bind him, but at the same time accepts a mortgage from the judgment debtor to indemnify him as such stayor, he is *estopped* by the recitals of the deed to deny his liability.

FROM BEDFORD.

The executions against Cooper, the stayor, were quashed by DAVIDSON, the presiding Judge, at the August Term, 1858. The plaintiffs appealed.

WISENER and TILLMAN, for the plaintiffs.

E. COOPER, E. A. KEEBLE and BUCHANAN, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

On the 1st of July, 1857, the plaintiffs recovered *seven* different judgments against Wood and Hart, before

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a justice of Bedford county, amounting, in the aggregate, to upwards of fourteen hundred dollars. The name of Cooper, the defendant, was entered as *stayor*, by the justice, under authority of the following instrument, addressed to said justice :

“Mr. F. B. PRICE,

“Sir:—You will enter my name as stay of executions on *five* judgments that Morgan & Co. obtained before you, on the 1st day of July, against Wood & Hart, for some eight or nine hundred dollars, and costs of suits. This 3d day of July, 1857.

“J. L. COOPER, [SEAL.]”

On the day following the date of said paper, 4th of July, Cooper took from Wood, one of the firm of Wood & Hart, a conveyance for land and negroes, in the nature of a mortgage. The conveyance is made to Cooper himself, with a power of sale, and an unlimited discretion to dispose of the property, publicly or privately, on such terms, and at such time, as he may think best to meet the payment of the debts and judgments therein specified, for which Cooper had become liable as surety and stayor for Wood & Hart, or one of them. And among other debts specified, is the following: “also, *one* judgment in favor of Morgan & Co., of Nashville, Tennessee, given 1st day of July, 1857, for \$1468.00, judgment against Wood & Hart, and *stayed* by said J. L. Cooper.”

Before entering the name of Cooper as stayor, the foregoing paper was altered, so as to insert the word *seven* instead of *five*, and by adding the words, “or more,” before the word dollars. The proof is not suffi-

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cient to establish, that the alterations were made by Cooper, or by his authority.

After the expiration of the *stay*, executions were issued on the several judgments; and thereupon, Cooper applied, by *certiorari*, to have them brought up into the Circuit Court to be quashed, on the ground that, by force of the foregoing paper, he was not legally bound as stayor.

The Circuit Judge held that he was not bound, and quashed the executions; and the plaintiffs appealed in error.

The legal effect of the deed of the 4th of July out of view, the judgment would be unquestionably correct. The paper upon which the justice acted, is, in its original form, insufficient to have authorized the justice to enter the name of Cooper as stayor; and even if sufficient as altered, it could not be regarded as binding on Cooper, upon the proof in the record, it not appearing that the alterations were with his knowledge, or by his authority.

But the fact of his taking the deed, on the day after his name had been entered as stayor, wholly changes the complexion of the case in our view.

He is a party to the deed. It was made to him, as well for his own indemnity, as for the security of the debts; and he is, by implication, constituted a trustee for the creditors. By the recitals of the deed he is estopped to deny his liability as stayor, for the fact is expressly recited in the deed. True, the description of the several judgments is not specific. The amounts are aggregated, and for the gross sum, as one judgment, in favor of Morgan & Co., against Wood & Hart, obtained

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on the 1st of July, 1857. The defendant, Cooper, is indemnified as the stayor. The want of a more minute description of the judgments in the deed, is no objection. The description is amply sufficient, in the absence of any proof of other judgments, between the same parties, on the same day, to demonstrate, to a moral certainty, that the debt provided for in the deed, is the same debt evidenced by the several judgments. The description in the deed is ample to enable the defendant to avail himself of the stipulated indemnity, in the event of his having, as stayor, to discharge the judgments. To hold him to his liability, therefore, is only to give effect to his undertaking, in the sense in which he himself intended it should have effect; of this he cannot justly complain. And we do so upon the principle, that the deed creates an estoppel upon him, to gainsay his liability as stayor. To hold otherwise would be, as it seems to us, to trifle with the administration of justice.

The judgment will be reversed, and the petition and supersedeas dismissed. And under the Code, §§ 3137, 3188, judgment will be rendered here in favor of the plaintiffs, as therein provided.

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1. CRIMINAL LAW. *Recognizance. Judgment when joint.* The judgment upon a recognizance for the appearance of a party charged with a crime, must pursue the terms of the defendant's undertaking. If, therefore, the recognizance entered into by the defendant and his se-

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curities, is joint and several, the State is entitled to but one judgment for the penalty thereof. It is error to render separate judgments against the defendant and each one of his bail.

2. **SAME. Pleading. Demurrer.** If several judgments are rendered upon a recognizance, when there should be but one, and separate writs of *scire facias* are issued on said judgments, the question as to the power of the Court to render more than one judgment for the penalty, may be raised by demurrer.
3. **QUESTION RESERVED.** The record does not raise the questions, whether a satisfaction of one of the judgments would preclude the State from enforcing satisfaction of any of the others; and whether the right of contribution between the bail exists, in case one should be subjected to satisfaction of the entire penalty, or a greater amount than his equal portion, and they are left undecided.

FROM CANNON.

Final judgment was rendered against the defendant, at the June Term, 1858, DAVIDSON, J., presiding. He appealed in error.

J. S. BRIEN, for the plaintiff in error.

SNEED, Attorney General, for the State.

McKINNEY, J., delivered the opinion of the Court.

At the February Term, 1857, of the Circuit Court of Cannon, the plaintiff in error, with two others, entered into a recognizance "in the sum of four thousand dollars, *jointly and severally* to be levied," &c., for the appearance of John Stovall, at the ensuing June Term of said Court, to answer a criminal charge of which he stood indicted in said Court. The defendant failed to ap-

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pear at the term to which he was bound, and judgments *nisi* were entered up *severally* against him and his bail; that is, a separate judgment for the penalty of "four thousand dollars," was rendered against the defendant, Stovall, and against each one of the three persons who were bound for his appearance. Consequently, instead of *one* judgment for the penalty of \$4000.00, "to be levied of their respective goods, chattels, lands and tenements," four distinct judgments, each for the entire penalty of the recognizance, have been obtained, and for the full satisfaction of which, each one is made separately liable. Separate writs of *scire facias* issued, to which the bail severally demurred, and on argument, the demurrers were overruled. A plea of *nul tiel* record was then put in, and found against the defendants; and final judgment rendered. From which an appeal in error was prosecuted to this Court.

The question as to the regularity of the proceedings, was sufficiently raised by the demurrer; and in rendering judgment thereon, we think the Court erred. It is too clear, we think, to admit of doubt, that the State was entitled to but one judgment for the penalty of the recognizance, which judgment ought to have pursued the terms of the defendants' undertaking; that is, the recovery should have been against them jointly and severally, to be levied of their respective goods, &c.

But it is said, that upon a joint and several judgment for the penalty, each one was liable individually, to the satisfaction thereof; and this being so, the error of rendering several judgments, if it be an error at all, is one of *form* rather than substance.

The demurrer raises the question, as to the power

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of the Court to render more than one judgment for the penalty, and this cannot be treated as mere matter of form. Nor would the suggestion, if correct, that a satisfaction of one of the judgments would preclude the State from enforcing satisfaction of any of the others, obviate the objection; though, upon this question, as it is not presented by the record, we express no opinion. Neither will we, for the same reason, consider the question as to the right of contribution between the bail, in case one should be subjected to satisfaction of the entire penalty, or a greater amount than his equal proportion.

We rest our decision upon the ground of want of authority in the Court to render several judgments upon the recognizance in question.

In this view of the case, the judgment must be reversed, and the demurrer, sustained.

JAMES ALLEN v. JAMES H. WOOD.

1. **APPEAL.** *Effect of.* Upon an appeal from a justice's judgment, the cause is not before the Circuit Court for revision, as on a writ of error, but for trial *de novo* upon the merits, and regardless of defects in the judgment of the justice, the Court should proceed to hear the case, and render judgment according to the merits.
2. **SUMMARY PROCEEDINGS.** *Judgment. Accommodation endorser.* Act of 1856, ch. 75. By the act of 1856, ch. 75, the remedy by motion

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is given only in favor of an *accommodation endorser*, and a judgment by motion, under that act, is defective unless it shows that the plaintiff is an *accommodation endorser*.

FROM CANNON.

The justice rendered a judgment for \$90.54, upon motion, in favor of the plaintiff. The defendant appealed to the Circuit Court, DAVIDSON, J., presiding, where, upon motion, the justice's judgment was quashed. The plaintiff appealed in error to this Court.

G. W. THOMPSON, for the plaintiff.

J. S. BRIEN, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was a motion for judgment, before a justice, by Allen, for money paid "as endorser" of the defendant. The justice rendered judgment for the plaintiff for \$90.54, from which there was an appeal.

In the Circuit Court, the defendant entered a motion to quash the justice's judgment, which, on argument, was made absolute, and the case dismissed.

In this the Court erred. The judgment of the justice is obviously defective in not showing that the plaintiff was an *accommodation* endorser of the defendant; as it is only in favor of an *accommodation endorser* that the motion is given by the act of 1856, ch. 75.

But whether the justice's judgment was sufficient, either as regards its form or substance, was not the question for the Court on the appeal.

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The case was before the Court not for revision, as on a writ of error, but for trial *de novo* on the merits; and, regardless of the defects in the justice's judgment, the Court should have proceeded to hear the case, and render judgment according to the merits.

The judgment will be reversed, and the case be remanded for hearing on the proof.

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CERTIORARI AND SUPERSEDEAS. *Dismissal of the petition. Judgment for 12½ per cent. interest. Code, § 8187.* Upon the dismissal of the petition for writs of *certiorari* and *supersedeas*, in which the judgment of the justice is complained of, and errors therein sought to be corrected, the plaintiff is entitled, under § 8187 of the Code, to a judgment against the defendant and his surety to the prosecution bond for the amount of the justice's judgment, with interest, at the rate of 12½ per cent. per annum, from its date, and costs.

FROM CANNON.

At the October Term, 1858, DAVIDSON, J., presiding, the petition was dismissed, and judgment rendered for the costs. The Court refused to render judgment for the debt, but awarded a *procedendo* to the justice. The plaintiff appealed.

G. W. THOMPSON, for the plaintiff.

J. S. BRIEN, for the defendant.

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WRIGHT, J., delivered the opinion of the Court.

The Circuit Court dismissed the petition for writs of *certiorari* and *supersedeas* in this cause, and rendered judgment against the petitioner, Wood, and his security in the *certiorari* bond for costs; but refused to give a judgment for the plaintiff's debt, and awarded a *procedendo* to the justice of the peace to issue execution upon the judgment before him in favor of the plaintiff.

This was error. It is obvious here, from the statement in the petition, that this is not a case where the judgment before the justice of the peace is not complained of, and the relief is sought alone from an unjust and illegal execution of it, as was the cases of *Kincaid v. Morris*, 10 Yer., 252, and *Edde v. Cowan*, 1 Sneed, 290. Here the judgment before the justice of the peace is complained of, and the writs of *certiorari* and *supersedeas* are substituted for an appeal. The petition not only asks that the execution issued by the justice may be removed into the Circuit Court and quashed, but also that the entire proceedings had before him may be removed, and a new trial had, and justice done the petitioner.

No other meaning can be given the petition than that the object of the removal of the cause to the Circuit Court was to correct the errors in the judgment and proceedings of the justice by a trial upon the merits.

It is true it is alleged in the petition by the defendant that he appealed from the justice's judgment within the two days, and gave bond according to law, as he is advised; yet we simply understand this as a reason why he has a right to substitute the writ of *certiorari* for the appeal.

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The plaintiff, therefore, was, under the 8137th section of the Code of Tennessee, entitled to a judgment in the Circuit Court against the defendant and his surety to the prosecution bond for the amount of the justice's judgment, with interest at the rate of 12½ per cent. per annum from its date, and costs. *Kincaid v. Morris*, 10 Yer., 252; *Rogers v. Ferrell*, 10 Yer., 254; *Burt v. Davidson*, 5 Hum., 426; *Jones v. Williams*, 2 Swan, 105.

The judgment of the Circuit Court will be reversed, and the proper judgment given here for the plaintiff.

LANIER & BROTHER v. THOS. G. SULLIVAN.

CERTIORARI. *Cause must be brought up to the next term of the Circuit Court.* A petition for a writ of *certiorari* to remove a cause from before a justice of the peace to the Circuit Court, must be filed before the next term of the Court after the rendition of the justice's judgment, and the cause brought up to that term, or a sufficient reason shown for not doing so.

FROM CANNON.

The motion to dismiss the petition was overruled by his honor, Judge DAVIDSON; and the plaintiffs appealed.

THOMPSON, for the plaintiffs.

M. M. BRIEN and FARE, for the defendant.

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WRIGHT, J., delivered the opinion of the Court.

The plaintiffs, on the 5th of August, 1854, recovered two judgments before a justice of the peace for the county of Cannon, one against Thos. G. Sullivan, for \$51.40, and the other against him and one Richardson, for \$136.78.

They were stayed by Vance and Gunter.

On the 14th of May, 1855, Sullivan filed his petition, and obtained from a Circuit Judge, writs of *certiorari* and *supersedeas*, to remove said causes, so far as he was concerned, into the Circuit Court of said county, to the end, that a new trial might be had.

In his petition he stated, that he did not owe the plaintiffs, and when notified to attend the trial he did so, but the attorney of the plaintiffs continued the cases several times, the last continuance being to the day on which the judgments were rendered; and that he attended on each of these days, and that the justice, on the day the judgments were rendered, being absent, he went home, and did not see him until about a week afterwards, when he informed him they had been stayed by Richardson, whose debts they were; and petitioner supposed he was clear of them, and did not learn that judgments were rendered against him, until it was too late to appeal; and that a few days before filing his petition, a levy had been made on his property, under executions issued on said judgments.

He gave no reason whatever, why he did not file his petition, and have the causes removed to the next term of the Circuit Court, after the rendition of the judgments.

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At the June Term, 1855, of the Circuit Court of Cannon county, being the first term after the filing of the petition, the plaintiffs moved the Court to dismiss the petition, which motion was overruled by the Circuit Court.

This was error. The petition should have been dismissed, because not brought to the next term of the Circuit Court after the judgments were rendered. *Johnson & Fenner v. Deberry*, 10 Hum., 489.

Judgment reversed.

PATRICK FAY v. ROBERT N. JONES *et al.*

1. CHANCERY PLEADING. *Demurrer. Original and amended bill.* If a demurrer is too broad it loses its effect. Hence, if a general demurrer is filed to an original and amended bill, and the original is defective and demurrable, yet the amended bill is not, the demurrer will not be sustained as to either.
2. SAME. *Same. Bill multifarious.* Objection to a bill because it is multifarious, can be taken only by special demurrer.
3. SAME. *Same. Attachment. Acts of 1836 and 1843.* If an attachment bill is filed, and no one of the grounds for an attachment embraced within the provisions of the attachment laws, is alleged, it will be dismissed upon demurrer.
4. FRAUDULENT CONVEYANCES. *Judgment not necessary before filing a bill. Act of 1852, ch. 365, § 10.* By the act of 1852, ch. 365, § 10, a

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creditor, whether he has a judgment or not, may file a bill to set aside a fraudulent conveyance, and have satisfaction of his debt out of the property conveyed.

FROM BEDFORD.

At the February Term, 1858, Chancellor RIDLEY dismissed the original and amended bills, upon demurrer. The complainant appealed.

E. A. KEEBLE, for the complainant.

W. H. WISENER, for the defendants.

WRIGHT, J., delivered the opinion of the Court.

The Chancellor dismissed the bill upon demurrer, and the question is, whether his decree can be maintained?

We shall treat the bill and amended bill as one, because they were filed at the same time, and the Chancellor's decree is upon both, and so we suppose the demurrer was intended.

So far as the complainant seeks relief, as the *surety* or *stayor* of Jones, the bill is demurrable, because it made no case for the issuance of an attachment under the acts of 1836 and 1843.

Jones is shown to be a citizen of Bedford county, and it is not alleged that he is about to remove, or any other cause for an attachment stated.

If, therefore, the demurrer had been confined to this part of the bill, it would have been well taken.

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But this was not the case. It is a general demurrer to the *whole bill*. And it appears that the defendant, Jones, is *indebted* to complainant in the sum of \$2380.00, and it is alleged, that he had made a fraudulent conveyance of fifty-two acres of land to the defendants, Brome and Jett, to hinder and delay his creditors; and the bill seeks a sale of this land, as well to pay *this debt*, as complainant's *liabilities*, as *surety* and *stayor*.

As a *creditor*, whether in judgment or not, the bill was maintainable by complainant, under the act of 1852, ch. 365, sec. 10; and the demurrer being too broad, lost its effect upon every part of the bill. Story's Eq. Pl., § 448.

But it is said the bill is multifarious, because it also seeks to subject Jones' interest in another tract of land, but we do not think this is so, under the rule laid down in *Johnson v. Brown et al.*, 2 Hum., 327.

But if it were, we apprehend the objection could only be taken by special demurrer. Story's Eq. Pl., § 455.

We reverse the decree, overrule the demurrer, and remand the cause, that defendants may answer.

B. J. VADEN, ADM'R, &C. v. ANN VADEN et al.

1. TRUST AND TRUSTEE. *Tenant for life quasi trustee*. A tenant for life is a *quasi* trustee for the remainderman, but is not so in the sense of a pure trust, as a personal representative, guardian, &c. In cases of pure trusts the fund is held *solely* for the benefit of the *cestui*

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que trust. But a tenant for life has a limited interest in the fund, with a right to use and enjoy the profits of it without accounting for the same to any person.

2. **LIFE ESTATE.** *Remainder. Rights of tenant for life and remainderman.* If a fund be given to a person for life, with remainder over to another, the tenant for life has the right to use and employ said fund in any way he chooses, if he does not endanger its safety.
3. **SAME.** *Same. Same.* If the tenant for life vest the fund in the purchase of slaves or other property, the title vests absolutely in him. The remainderman has no right to, or interest in the property, except so far as it may be held, upon a bill for that purpose, as a security for the fund.
4. **SAME.** *Same. Same. Illustration of the principle.* A fund was bequeathed to A. for life, with remainder to B. A. purchased a negro girl with a portion of the fund thus bequeathed. A. afterwards intermarried with D. Upon the death of D., his administrator claimed the negro and increase as the property of the estate. The remainderman claimed the right to elect whether he would take the slaves or the fund. It is held, that the title to the slave vested absolutely in A., and, upon her marriage with D., the title passed to him by operation of law, and upon his death to his administrator; that the remainderman had no right to, or interest in the slaves. All that he could demand would be the *corpus* of the fund at the death of the tenant for life.
5. **WILL.** *Question reserved.* If a nuncupative will is admitted to probate, although not executed according to the requirements of the act of 1784, can it be disregarded in a proceeding in another Court? Or shall it be held as a matter adjudged and settled by competent authority, not subject to re-examination at any time, but by the statutory mode of calling for a re-probate in solemn form, and a trial upon an issue of *devisavit vel non?*

FROM SMITH.

This cause was heard upon original and cross-bills, before Chancellor RIDLEY, at the February Term, 1858. The complainants in the cross-bill, and Ann Vaden, a defendant in the original bill, appealed.

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SAM'L M. FITE and JORDAN STOKES, for the administrator.

J. B. MOORES and J. C. GUILD, for the appellants.

CARUTHERS, J., delivered the opinion of the Court.

The original bill was filed by Benjamin J. Vaden, administrator of his father, Lodwick Vaden, to obtain the possession of about sixteen slaves, as a part of the estate, from Ann Vaden, the widow, who sets up a claim to them for her life, and the remainder in her sister, Elizabeth McCrary, and Polly Johns, the sister of her first husband, under his nuncupative will. So she denies that they were the property of her late husband, or are now a part of the assets to which complainant is entitled.

The cross-bill is filed to set up and have protected this remainder right.

The Chancellor sustained the claim of the administrator, and dismissed the cross-bill. The facts are as follows:

Isaac Johns, the first husband of Ann, died without children, in 1809. His widow, the said Ann, took possession of and claimed his personal estate, or its proceeds, of the amount of eight or ten hundred dollars, under a nuncupative will, in her favor for life, and then to her youngest sister and his, equally, in remainder. In 1810, she married Jonathan Key, of North Carolina, and moved there with him. They returned in 1812, and settled in Smith county, bringing with them the negro girl Esther, then very young, of whom all the slaves in controversy are the issue. She was bought in

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North Carolina for about \$275, with a part of the money derived from the Johns' estate, and title by bill of sale, in the usual form, made to the said Ann in her own name, but without restrictions or limitations over.

Jonathan Key made his will in 1826, and the same was admitted to probate at the February Term, 1828, of Smith County Court. He had a number of children by a former wife, but none by the last. In making provision for her, among other things, he says: "I will and bequeath to my beloved wife, Ann Key, my negro boy Big-Hardy, and girl *Esther and her increase*, * * at her discretion for ever."

Lodwick Vaden, being a widower with several children, married the said Ann in 1829 or '80, and died intestate, in March, 1856. The widow refusing to surrender these slaves upon demand of the administrator, this bill was filed in April, 1856.

It will be seen from this statement that the question is, whether the title of the said Ann was such as to vest in Vaden on the marriage.

The cross-bill only claims one undivided half of said slaves, as it admits that the other half was sold to Key in his lifetime by Henry Beasly, who married Polly Johns, and he is long since dead. McCrary is the second husband of Elizabeth West, and in her behalf claims the other moiety of the remainder in said slaves, under the will of Johns. But even as to the moiety of Polly Johns, the administrator's right to recover is resisted because of the widow's life estate, which, it is insisted, never became the property of Key, as he only purchased the remainder of Polly Beasly, which did not of course affect the life estate.

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The proof is very voluminous, and is mostly of facts and conversations in relation to the manner in which these slaves were held by the said Ann and her two last husbands. These are, of course, conflicting and contradictory, as might be expected in transactions so ancient, and which are presented in so many phases; and we are left, as in most of such cases, to presumptions of law and of fact arising from the acts and declarations of the parties to bring us to any conclusion as to their respective rights.

The origin of the remainder right, if it exists at all, must be found in the nuncupative will of Isaac Johns. This is attacked at the outset as invalid; not having been made and established as required by the act of 1784, ch. 22, §§ 15 and 16. This is certainly so, as it is scarcely possible to conceive of a greater departure from the requirements of the act. It does not conform to it in any essential particular. But it was "established by the Court as the will of said deceased, and ordered to be recorded." It was not opposed at the time, and has never since been contested. Whether it can now be disregarded, as it has been passed upon and set up by a Court of general jurisdiction of those questions, or shall be held as a matter adjudged and settled by competent authority, not subject to re-examination at any time but by the statutory mode of calling for a reprobate in solemn form, and a trial upon an issue of *devisavit vel non*, need not now be decided, as the case may be disposed of upon other grounds. In the view we take of the case, the administrator of Lodwick Vaden, who claims the title to the slaves, has no interest in that question; but that it is one which concerns the

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widow and the complainants in the cross-bill, both of whom recognize and rely upon the will as valid.

According to this will, then, Isaac Johns gives his whole estate, both *real* and personal, to his wife, Ann, for life, and the remainder to *his* and *her* youngest sister, equally. The claim set up to these slaves is by *her* sister and her present husband, to secure their interest thus created in the one-half of this property. It has been before stated that Esther, the mother of all the slaves in controversy, was purchased with \$275 of the money derived from Johns' estate, under this will, and the absolute title by bill of sale taken to herself, while she was the wife of Key, her second husband, in 1811. In 1826, as we have seen, he bequeathed them to his wife Ann as his own, without restrictions or limitations. Key died in 1828, and the slaves remained in the possession of the widow. She married Vaden in 1829 or '30, and they went with her into his possession, and so continued until his death. There is much proof as to her declarations and of his, in loose conversations, in relation to the title, and this supposed remainder interest was frequently referred to and acknowledged by her, and perhaps by both. But the negroes still continued in the possession and under the control of Vaden, and were managed and used as his own. The neighbors regarded the ownership and character of holding in different lights, according to the different conversations they might happen to hear, or the constructions placed upon the acts and words of the parties. All this, as it appears in the record, is too vague, uncertain, and contradictory to predicate any right of property upon it, and leaves the case for the operation of the

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rule, that the title is presumed to be with the possession, and the marital right to attach, unless the contrary is made to appear in a reliable and satisfactory mode.

We consider it clearly established, that the title to the girl Esther, at the time of her purchase passed into Key, as the husband of Ann, in 1811, and by his will to her again, in 1828, and upon her marriage with Vaden, in 1830, into him, by virtue of his marital right. Consequently they would constitute a part of his estate at his death. But although this may be so, it is insisted on the other side, that inasmuch as the fund with which they were originally purchased was subject to the remainder of complainants in the cross-bill, after the termination of the life estate, that they have a right to elect whether they will receive the fund or the property in which it was invested by the tenant for life. This is the main and decisive question in the case.

We are not aware that the *precise* question has ever been adjudicated in this State. But the principle stated in *Bonner v. Bonner*, 7 Hum., 436, would seem very nearly to meet the case. There the remainderman filed a bill asking security for the safety and forthcoming of slaves obtained in exchange for the one in which they were interested at the end of the life estate. This was refused as to the slaves received by the tenant for life in exchange, the Court saying, "we are aware of no principle or precedent which would sanction or authorize it." It was argued by counsel in that case, as it is here, upon the authority of *King v. Sharp*, 6 Hum., 56, and other authorities, that the tenant for life

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was trustee for the remainderman, and, consequently, that the latter was entitled to have the original fund or the property, or that in which it might be invested or for which it was exchanged, at his election, upon the general principle on that subject applicable to trustees and beneficiaries. But this argument was considered unsound by the Court. In the case of *King v. Smith*, 6 Hum., 56, the tenant for life is held to be a *quasi* trustee, and, further, that "he may dispose of the property at pleasure, so that he does not thereby injure the inheritance in remainder." He may not remove it out of the State so as to endanger the safety of the property, or destroy it. He may use it, and make all the profit on it he can, with due regard to its safety and protection. To that extent he may be called trustee; but he is not so in the sense of a pure trust, as a personal representative, guardian, &c.

In North Carolina the precise question has been more than once before the Court, and explicitly decided. The case of *White v. White*, 1 Ire. Eq., 441, is exactly in point. That was a case thus stated in the abstract: "A. devised to his wife, whom he also appointed his executrix, \$1,000 during her life, and after her death to his children. The wife purchased negroes with this money, and they greatly increased in value. Held, that the children had no right or interest whatever in these negroes, but that they belonged absolutely to the wife. The remaindermen had only the right to the \$1,000 at the death of the wife. Upon a bill stating that this sum could only be raised out of the negroes, the Court would, during the life of the wife, decree that they should be held as security for the cap-

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ital sum." The distinction is there drawn, very clearly, between the case of an executor and other trustees, who cannot use or convert the trust fund so as to make profit to themselves and that of a tenant for life. The cases are certainly very different in principle. In the former case the fund is held entirely and solely for the *cestui 'que trust*, and, consequently, any gain or profit made upon it by its use or exchange should inure to the benefit of the owners. So their right to elect whether they will have the fund with interest, or the property in which *their money* may have been invested, or the gain upon its use, is secured to them by a most equitable and well established rule. But the case is entirely different with a tenant for life. He has a limited interest in the fund, with a clear right to use and enjoy the profits of it, without accountability for the same to any one. Suppose the fund was used in speculation, or business of any kind in which it might be doubled or quadrupled every year, would any one contend that the remainder could have the advantage of that? If, instead of loaning it, and living upon the interest, it be invested in horses, or slaves, or land, is the right of those in remainder enlarged? Have they any other right but to have the *corpus* secured? There is no restriction on the mode of using the money. That must depend upon the will and choice of the tenant for life. If the fund were, by direction of the will, to be invested in slaves, and they to be held as the fund, there would be a trust, and the question would be changed.

In the case cited from Iredell, the tenant for life of the fund was also executrix; and that would make

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the argument more plausible to hold her to the liabilities of a technical trustee as to the remaindermen. In this particular that might be a stronger case than the one in hand. *Black v. Ray*, 1 Dev. & Bat. Eq. R., 443, is cited as sustaining the same principle, but we have not been furnished with the book.

We think the position well sustained by reason and authority, that a remainderman has no right or claim to the property purchased by a tenant for life of a fund, but that the same is the absolute property of the latter. But it may, where a necessity is shown to exist in a bill framed for that purpose against the tenant for life, be held as a security for the fund used in its purchase. This cross-bill is not with that view, but simply to assert title to the slaves, and resist the claim of the administrator to them as assets.

It also appears that the remainder in the \$275 paid for the slave is in no danger, as the tenant for life is perfectly good and solvent, and will be entitled, as distributee of her late husband, Vaden, to a share of these very slaves, besides other property.

Thus we are brought to the conclusion that the slaves in question were the absolute property of Lodwick Vaden at the time of his death, and must be recovered by the administrator by his original bill; and that the cross-bill setting up a claim to the remainder, with a life estate in the widow, must be dismissed. And this affirms the decree of the Chancellor.

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CRIMINAL LAW. *Larceny. Variance between the indictment and proof.*

In an indictment for larceny, whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either. Thus, if a constable has collected money for another, and it is stolen from him, it may be laid as the property of the constable, or the owner. If the money, at the time stolen, was in the possession of the wife, her possession would be that of her husband.

FROM BEDFORD.

The defendant was tried and convicted at the December Term, 1858, before Judge DAVIDSON. He appealed in error.

WISENER, TILLMAN and BURTON, for the plaintiff in error.

SNEED, Attorney General, for the State.

WRIGHT, J., delivered the opinion of the Court.

The plaintiff in error was convicted in the Circuit Court of Bedford county, for larceny, in stealing two twenty dollar bank notes upon the Shelbyville Bank of Tennessee, and has prosecuted an appeal in error to this Court.

The ownership of the bank notes is laid, in the indictment, to be in John B. Bates, and the main error relied upon here for a reversal is, that this averment is

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not sustained by the proof, and that the Circuit Judge erred in holding that it was.

Bates was a constable, and had collected these notes for John F. Hall, a creditor. He told Hall he had the money, and would bring or send it to him; whereupon, Hall told him to leave it with Mrs. Bates, the wife of John B. Bates, and that he would call and get it; he, Bates, being often, necessarily, absent from home.

He handed the money to his wife to keep till Hall called for it. On the morning of the theft, being about to leave home, she took the money out of a collar-box, where she had put it for safe keeping, and told her husband to take it, as she was going from home, but he refused to do so, and told her to keep it, as he did not know what moment Mr. Hall might call for it. She then restored it to the box in which she kept her collars, and set it on a bureau in the family room, the prisoner being present and seeing it.

From this box, in a few moments afterwards, the money was stolen.

There can be no doubt, that, upon these facts, the conviction was proper, and the ownership of the money well laid. The possession of the wife here, was the possession of the husband, and the special property, to say the least of it, was in him. It is well settled, that whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either. As for instance, goods left at an inn, or entrusted to a person for safe keeping, or to a carrier to carry. Wharton's Am. Cr. Law, 568; *Owen v. The State*, 6 Hum., 330; *The People v. Schuyler*, 6 Cow. R., 572.

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The guilt of the prisoner is established by the proof, to our satisfaction, and the verdict of the jury well supported. This is not seriously controverted.

The affidavits for a new trial have nothing in them. They disclose no newly discovered testimony, and if the fact sought to be established by them, had been before the jury, it could not have benefited the prisoner or changed the result.

The judgment of the Circuit Court will be affirmed.

NEWTON LINTZ v. JOHN F. THOMPSON.

1. **PAYMENT.** *Voluntary by an officer, of an execution in his hands.* If an officer, by his neglect, render himself liable to the plaintiff in an execution; and being so liable, without any judgment or proceeding against him to enforce his liability, he voluntarily pays to the plaintiff the full amount of said execution, without any transfer of the judgment and execution to him, it is a satisfaction of said judgment, and he cannot, thereafter, take out an *alias* execution for his *own benefit*, and enforce its payment by the original debtor.
2. **SAME.** *Same. Case in judgment.* An execution was placed in the hands of a constable, who neglected to make the money and return the execution in due time. Having rendered himself liable to the plaintiff, he, voluntarily, paid the judgment to him, without any judgment or proceeding against himself to enforce said liability. He returned the execution not satisfied, and procured the issuance of an *alias* execution upon the judgment for his *own benefit*, which was *superseded* on the petition of the defendant. Held, that the voluntary payment by the constable was a satisfaction and extinguishment of the judgment, and the payment having been voluntary, the law would not imply a transfer of the judgment to the officer. That two things are necessary to create an implied transfer of a judgment to

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an officer paying it: First, That the liability of the officer in default shall have been fixed by the judgment of a tribunal of competent jurisdiction; and, secondly, That such judgment shall have been satisfied.

FROM BEDFORD.

The execution was quashed by the Circuit Court DAVIDSON, J., presiding, at the December Term, 1858. The constable appealed.

BURTON, for the plaintiff.

E. COOPER, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

On the 4th of October, 1856, Lintz recovered a judgment against defendant Thompson, and another, before a justice of Bedford county, for \$76.50. On the 15th of June, 1857, an execution was issued on said judgment, and placed in the hands of one J. L. Burt, a constable of said county, for collection. The constable by reason of neglect to make the money, and return the execution in due time, rendered himself liable to a judgment on motion, under the statute. And being so liable, without any judgment, or proceeding against him to enforce his liability, he voluntarily paid to the plaintiff the full amount of said judgment. There was no transfer of the judgment to the constable, upon his payment of the money; nor was anything done to obviate the legal

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effect of the payment, as a satisfaction and extinguishment of the judgment.

Afterwards, on the 22d of April, 1858, the constable returned said execution "not satisfied," and procured the issuance of an alias execution upon the judgment, for *his own benefit*. And, on the petition of the defendant, the execution was superseded and quashed by the judgment of the Circuit Court.

This judgment of the Circuit Court, quashing the execution, is said to be erroneous. We do not think so. The case falls within the principle of *Harwell v. Worsham*, 2 Hum., 524, which establishes, that if an officer pays off an execution to the judgment creditor, without an assignment or purchase of the judgment, it is an absolute discharge of the execution, and the officer cannot hold the execution, as unsatisfied, and enforce it for *his own benefit*.

And we hold that, in the case before us, the execution was not only satisfied, but the judgment itself was absolutely extinguished, so that no other execution could be issued thereon.

The argument for the plaintiff implies, that the principle of *Harwell v. Worsham*, is in opposition to the recent case of *Smith v. Alexander*, 4 Sneed, 482. This is not so. The cases are perfectly consistent with each other. The latter case recognizes the doctrine, that if a collecting officer or agent, on the ground of official negligence, has been subjected, by judgment of law, to pay the amount of the debt to the creditor, the legal effect is, that, by an implied transfer or assignment, the debt passes to the officer or agent, who may enforce it against the original debtor. But it must be observed,

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that to produce this result, two things are indispensably necessary: First, That the liability of the officer in default, shall have been fixed by the judgment of a tribunal of competent jurisdiction; and secondly, That such judgment shall have been satisfied. It is by force of these two concurring facts, that the implied transfer of the debt is effected. It follows, therefore, that a voluntary payment by the officer in default, as in the present instance, will have no such effect. In this view of the case, it does not become necessary to consider the construction and effect of the act of 1850, ch. 145.

The distinction, in principle, between the cases cited, will be obvious on a moment's reflection. In the one case, the money is advanced voluntarily by the officer, upon the execution or judgment; and, therefore, in the absence of anything to exclude the inference, the law will conclusively presume that it was paid in satisfaction of the execution or judgment, and will give it that effect. But, in the other case, the payment is compulsory, and not upon the original execution or judgment, but in satisfaction of the recovery against the officer for his own personal default; consequently, in the latter case, the original judgment is left in full force; and both, in fact and in law, remain unsatisfied. In the one case, there is a thing *in esse*, capable of being transferred; but in the other case, nothing remains to be assigned, in any mode.

Judgment affirmed.

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HELEN M. WINCHESTER *et al.* v. JAMES M. WINCHESTER *et al.*

1. **CHANCERY PRACTICE.** *Bill of review. Statute of limitations.* Act of 1801, ch. 6, § 58. The saving in the act of 1801, ch. 6, § 58, to infants, *femes covert*, persons *non compos mentis*, &c., a right to move for a bill of review within three years after such disability shall have been removed, applies both to bills for new matter, and for errors apparent upon the record; and any person within said saving of the statute, may file a bill of review at any time during the existence of the disability, or within three years after its removal.
2. **SAME.** *Same. Same. Parties. Husband and wife.* A *feme covert* or other person laboring under a disability, is not bound to wait until the removal of such disability, before filing a bill of review. If an antagonism exists between the interests of husband and wife, or if he has lost his rights by *laches*, and thereby placed himself in an attitude where he cannot join his wife in the suit—her rights remaining in full force—she may file a bill of review by next friend, making her husband a defendant.
3. **SAME.** *Same. Pre-requisites to filing a bill of review.* An application to file a bill of review for new matter, must be by petition and affidavit, setting forth the new matter, accompanied by an offer to secure costs, and such other sums of money as may be required to be paid; and also security must be given for the costs of the bill filed as of common right.
4. **SAME.** *Same. Joinder of new matter and errors apparent.* A bill of review may be brought for errors of law apparent on the face of the decree, and also for newly discovered matter. The joinder of both grounds in the same bill does not make it multifarious.
5. **SAME.** *Same. New matter. Leave of the Court.* A bill of review for newly discovered evidence, cannot be filed without special leave of the Court. The new matter must be such as "hath arisen in time after the decree, or proof that has come to light after the decree was made, which could not possibly have been used when the decree passed." The new matter or new proof, must be relevant and material, and which, if known at the time the decree passed, would have produced a result more favorable to the party filing the bill.
6. **SAME.** *Same. Same. Knowledge of agents or representatives.* Representation in Courts of Justice is a necessity of civilized society, and the acts or neglects of the representative must, in some degree, be

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binding upon the party represented. And persons under disability at the time of a judicial proceeding to which they are parties, represented by their guardians and agents, are bound upon the knowledge of such guardians and agents.

7. **SAME. Same. Errors apparent in the decree. Sale of land, Act of 1827.** It is error to file a petition for the sale of land, embracing adults, married women and their husbands, and minors, together. The proper mode of proceeding under the act of 1827, where minors are interested, is, by bill *inter partes*, making the minors defendants. A proceeding, however, by petition, under the act of 1827, is not void, and it is not error for which a bill of review will lie.
8. **SAME. Same. Same. Same. Same. Husband and wife.** The act of 1827 was, for convenience, intended to act by divestiture of title by decree, and it chooses to repose some confidence in the conjugal relation, and not to regard husband and wife as occupying such an antagonism, as will prevent their being joined in a petition for the sale of land descended to her; and in proceedings under said act, the privy examination of the wife is not necessary to pass the title. An omission, therefore, to make the wife a defendant, or to cause her privy examination to be taken, is not error apparent for which a bill of review will lie.
9. **SAME. Same. Same. Sale of an undivided interest.** The sale of an undivided interest in land is not such an error upon the face of the proceedings as will make the sale void, and the same will not be annulled on review. Such a mode of sale would not be favored upon appeal or writ of error, but does not furnish sufficient ground for a bill of review.
10. **SAME. Same. Same. Facts stated in the decree.** Upon a bill of review the evidence in a cause can not be looked to, beyond the decree; and the statement in the decree, that "the Court being satisfied of the truth of said petition, and that it is for the manifest advantage of the heirs that said lands be sold, is equivalent to the statement that it appeared to the Court that the facts stated, &c., were true, and is a sufficient statement of the facts under the rules of chancery practice and under the act of 1827.
11. **SAME. Same. Same. Lands without the chancery district.** If any portion of the lands sought to be sold, lie within the chancery district, the Court has jurisdiction to order the sale of the entire lands, although situated in different counties in the State. Hence, a decree for the sale of lands in counties not embraced in the chancery district, is not void, and a bill of review will not lie.
12. **SAME. Same. Day in Court.** The doctrine that a party under a disability is entitled to a day in Court, has no application where title

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is divested by decree, but only where the party is directed to convey. In this case it was no error not to give the infants a day in Court.

13. *SAME. Same. Parties.* If the parties in interest are not made parties to the petition, they are not bound by the proceedings, and an original bill, in the nature of a bill of review, will lie; but the form of making them parties is not material—whether mentioned in the caption, or represented as petitioners, and the names placed at the end of the petition.
14. *SAME. Same. How far the title of purchasers affected.* It may be laid down as a general rule, that whenever a Court of Chancery, or other Court of general jurisdiction, possesses jurisdiction of the subject matter of litigation, and has acquired jurisdiction of the parties, that, as to third persons interested under its judgments and decrees, its proceedings cannot be held to be void after a final disposition of a cause. And in this respect, it is not material whether the jurisdiction be inherent or statutory, provided the statute be of a general or public nature.

FROM SMITH.

Chancellor RIDLEY refused the application of the complainants, to file a bill of review, and they appealed from his decision.

JO. C. GUILD, for the complainants, said:

Bills of review may be filed: First, for errors apparent upon the decree, or for newly discovered proof since the rendition of the decree, which could not have been discovered and produced previous to the making of the decree. The ordinance of Lord Bacon is in force in this State. *Colville v. Colville*, 9 Humphreys, 524; *Burdine v. Shelton*, 10 Yerger, 41. Story's Eq. Pl., 321 to 333; 3 Daniel Ch. Pr., 1728.

A bill may unite both of these grounds. The same authorities referred to above.

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The lands decreed to be sold by the Chancery Court at Carthage, in 1829, lay outside of the chancery district, to wit, in Shelby, Weakley, and Stewart counties. The heirs of Gen. Winchester were joint petitioners, embracing infants and *feme coverts*. Helen M. is a *non compos mentis*, and has been so since her birth; has since been so declared, and a guardian appointed. She was represented by her guardian in the Carthage proceedings, who was a joint tenant in common; was the executor of her father, and the commissioner who made the sale. There was no proof taken in said case. There was not even a reference to the Master. The decree merely recites, "the Court being satisfied of the truth of said petition, and that it was for the manifest advantage of the heirs that said land be sold; think proper to order and decree that the same be sold."

There is no fact embodied in the decree to give the Court jurisdiction under the act of 1827, ch. 54. In the language of that act, there must be satisfactory proof that the land was so situated that partition thereof could not be made in the mode pointed out by law, or that they were of such description that it would be manifestly for the advantage of the heirs that the same be sold. Our Supreme Court, in a late case, *Davidson v. Bowden et al.*, say, that by satisfactory proof is meant such proof as demonstrates or clearly and certainly establishes the truth of the fact, or the point in issue. Now, in the case under consideration, there is neither the proof required nor the statement of facts in the decree, and, as decided in the case of *Davidson*, renders this decree, and sale under it, void; which may be reversed by bill of review, for errors apparent upon

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the face of the record. Further, it is decided in the case of *Davidson v. Bowden*, that in all cases where it is sought to affect the interest of infants, and more especially their interest in real estate, by a sale converting it into personalty, the infants ought to be made defendants. They are incapable of protecting their rights, or of forming a judgment whether lands should be sold or not. It often happens, that in cases of adult co-tenants, that a sale of land would be beneficial to them—would promote their interest, while it would prejudice that of the infants. And the interest of the adults are in conflict with the infants. The attitude of defendants, in various respects, is more advantageous for infants than that of plaintiffs. It has frequently been decided by our Court, to legalize the sale of an infant's land where there are adult co-tenants, that the infants should be made defendants, and process served upon them; then the Court will appoint a suitable guardian *ad litem*, whose duty it is to make the proper defence, and who is responsible for the propriety and conduct of such defence. 2 Paige, 304; 1 Daniel, Ch. Pr., 204.

An infant defendant is not bound by the decree, as an infant plaintiff. In England a day is given the infant, after he arrives at age, to open and have the case re-heard. 1 Dan. Ch. Pr., 92.

For this defect in the Carthage proceedings the decree is clearly void, and would be reversed upon appeal or writ of error; and combine this defect with the other errors apparent upon the face of the decree, the decree should be reversed upon bill of review.

In 10th Hum., 610, *Whitmore v. Johnson*, held in the case where the question came up collaterally, that

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the decree for the sale of land, and that the sale was void, if the decree does not, upon its face, recite facts giving the Court complete jurisdiction to make the sale.

The complainants, in this bill of review, have been laboring under disabilities—two of them *femes covert*, the other a *non compos mentis* since the date of the decree, in 1829. The act of 1801, ch. 6, § 53, embraced in the Code, § 3120, provides that no bill of review shall be brought, or a motion made therefor, except within three years from the time of pronouncing the decree, saving to infants, married women, persons of unsound mind, imprisoned, or beyond the limits of the United States, a right to a bill of review within three years after such disability has been removed.

In the case above cited, of *Colville v. Colville*, this saving of the statute in favor of infants, coverture, &c., is recognized as the law. Consequently the Chancellor erred in refusing to permit this bill of review to be filed.

Further, there is error apparent upon this record in this. There were two tracts of land, one of 226½ acres, the other of 100 acres, in Weakley county, and 1,000 acres in Stewart county, sold by the commissioner without being mentioned in the petition, without proof, and without a decree authorizing the sale.

Further, there is error apparent upon the record in decreeing that an undivided eighth part of 1,309 acres of land, including a part of the town of Memphis, should be sold, infants and *femes covert* being interested therein. The other parties in interest not being before the Court, the land not being set apart to the heirs of Gen. Winchester, the same not being divided, the pur-

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chaser would not have the right to the exclusive possession, and, consequently, that interest would be greatly prejudiced by a sale. And there is no authority given by the act of 1827 to decree a sale in such cases.

Our Court held in the case of *Norment's, adm'r, v. Wilson*, 5 Hum., 310, that interests in reversion or remainder can not be sold for partition under the act of 1827, ch. 29. The Court, in the case of *Robertson v. Robertson*, 2 Swan, 201, says that the interest of minors in real estate should not be sold until the right of present enjoyment accrues by the determination of the life estate. In analogy to those decisions, the undivided one-eighth interest in a tract should not be sold.

Those proceedings were by petition. The act of Assembly requires it to be done by bill in the Circuit or Chancery Court of the county or district where such lands may be situated, and the suit shall be conducted in the same way as other suits in equity.

Now, I insist that the act of Assembly is imperious as to the mode of proceeding, and, as a general rule, when the powers and remedies of a Court of Chancery are called into action, it is done by bill and not by petition. After the bill is filed, then through its various stages, the petition may be used. 3 Daniels Ch. P., 1801. The act of 1827 construed strictly, no amplitude given to it by construction. 5 Hum., 310.

The petition is in the name of the guardian, and not in the name of the infants. They must sue in their own names, and not that of their guardian. 1 Swan, 79; 2 Alabama R. 406.

This petition is in the name of the husbands and wives, consequently it is the petition of the husband

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merely. The decree is not binding on the wife in case of conflict of interest. The wife can have it set aside by bill of review. 9 Paige, 256.

There is error in the proceedings as to the lands in Stewart and Weakley counties, and some of the lots in Memphis, which were neither mentioned in the petition nor decreed to be sold. Yet the commissioner sold them, and the Court confirmed the sale. Further, those lands lay out of the county or chancery district where the petition was filed. Our Supreme Court has lately decided that the Chancery Court had not original or inherent jurisdiction, but rests its jurisdiction upon the act of 1827. That jurisdiction is local and not general. In 2 Swan, 380, they declare this jurisdiction to be local, and a sale of the lands outside of the chancery district is consequently void.

As to the newly discovered proof upon which this bill of review is asked to be filed, reference is made to the bill, which appeals strongly to the discretion of the Chancellor to permit the bill to be filed, in order to have vindicated the rights of *femes covert* and the infants, where, under void proceedings, an estate now worth perhaps one million of dollars, has been sacrificed for a few hundreds.

Femes covert and infants, during their disability, may bring their suit to protect their rights, and are not compelled to wait till the disability is removed. Angel on Limitations, 207.

HEAD & TURNER, for the complainants.

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MARSHALL, THOMPSON, WICKERSHAM, and SMITH, for the defendants.*

JOHN J. WHITE, for the defendants.

What are the errors of law apparent in this record?

1. That there was no *privy examination of the femes covert*. Our acts of Assembly in reference to deeds of conveyance by husband and wife, prescribe the *privy examination of the wife*; but have no reference to a divestiture of title from a *feme covert* by the power of a Court of Chancery.

This doctrine about the *privy examination of the feme covert*, it will be seen, by looking at the cases, applies only to *private alienations* made by the wife of her property, acts *in pais*, and the waiver of an equity. Clancy on Rights, 314, 537; 1 Hum., 54; 2 Ib., 548; 2 Swan., 218; 3 Sneed, 578; 10 Hum., 197.

2 It is alleged as error that *Helen M. was a minor*, and should have been represented by a guardian *ad litem*, and made defendant. It is true that might have been more technically correct; but, in a case like the present, is it not apparent that it would have been mere matter of form, and, at this late period, constitutes no substantial ground of error. Story's Eq. Plea., § 411.

The act does not speak of either plaintiffs or defendants, but of a "bill in the Circuit or Chancery Court," and of "suits in equity;" and there are

* Their briefs are not on file, or they would be inserted.

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many *ex parte proceedings in equity*, where the parties are all complainants or petitioners, which is the same thing, and which might properly be called "bills or suits in equity." A case might be readily supposed, where all the heirs are minors, and yet it would be for their advantage that their real estate should be sold, and it would come within the language as well as spirit of the act, and such are some of the cases in our reports; and yet, from the necessity of the case, they must be complainants, or their case not entertained at all.

It occurs to me that this is merely descriptive of the character of the proceeding. It is not the substance of the act in what way the parties names are presented upon the record—whether plaintiffs or defendants. It is not that which gives the Court jurisdiction. If it be an irregularity or error, it is one which the parties may waive, as they have done in this case, according to the maxim, "*Quisque potest renunciare Juri pro se introducto.*"

The case of *G. C. Brown*, by his next friend, *George W. Campbell*, in 8 Hum., 200, was the case of a decree for the sale of the land of the minor under this act of Assembly, in the Chancery Court at Nashville, of land lying in Davidson county. It is styled a *petition*, and the party a *petitioner*, and he is the *sole petitioner*. This was sustained. And if one person, a minor, being the sole owner of real estate, could file a petition, I submit to the Court it would not be a fatal error if a half dozen owners were to unite in the same petition, their interests being the same.

For such an irregularity to make the whole proceed-

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ings void would be overruling the cases of *G. C. Brown by his next friend ex parte*, 8 Hum., 200, of *Blackmore v. Shelby*, Ib., 489, and *Todd v. Cannon*, Ib., 512.

3. It is said these *femes covert* should have been made defendants instead of complainants. I do not understand that to be the rule of a Court of Chancery. On the contrary, they should unite with their husbands as complainants in any matter affecting their rights and interests, unless they were claiming some right in opposition to their husbands. In that case they might appear by their next friend. Story's Eq. Plea. § 61. So, also, when they are defendants, their husbands should join with them, and their answer be joint. See § 71. Also, 7 Vermont, 369, *Bradley v. Emerson et als.*

4. It is alleged there was no proof taken in the cause, nor facts recited in the decree. As it regards the absence of proof, the *presumption* is there was such *proof*. The language of the decree is, "that the Court is satisfied of the truth of said petition, and that it is for the manifest advantage of the heirs that said land be sold." Therefore a decree is pronounced ordering the sale. The act of Assembly requires "satisfactory proof," without stating its character, and which was no doubt presented to the Chancellor. The proceedings of Courts, especially, after a great lapse of time, will be presumed to have been regular, though the records of service, parties, &c., are not to be found. *Cruger v. Daniel*, Riley's Chan., 102. See too, 1 Bibb, 338.

But then, as this Court has said in the case of *Eaton v. Dickinson*, 3 Sneed, 397, upon a bill of review no such question can be made as the wrong con-

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clusions of the Chancellor upon matters of *fact*, but it must be *errors of law* apparent in the decree.

But then the facts are not recited in the decree which makes it error. Now it is wholly unnecessary to encumber the record with the repetition of the facts exhibited in the pleadings. The results to which the Court arrives are sufficient. The petition is a *part of the record*, and the Court say they are "satisfied of the truth of the petition," "and that it is for the manifest advantage of the heirs that said lands be sold."

I would remark, too, that the rule adopted by the Chancellors requiring "the facts as they appear in proof before the Court" to be recited in the decree, did not take effect until the 15th of August, 1830, which was *after the decree*. See Story's Eq. Plea., § 407, and note, which will show the statement in the decree in regard to the facts to be amply sufficient.

5. It is alleged that a portion of the lands are out of the local jurisdiction of the Court, and therefore the decree was void. The Chancery Court, as I understand it, is one of general, not local jurisdiction. Here are heirs inheriting real estate in half a dozen or more counties in the State. Can it be that they would be required to have as many different law suits in the prosecution of their rights, and that among themselves? If so, the litigation and expense would be endless. Upon general principles, it seems to me, that jurisdiction of part would give jurisdiction to the whole. This question, however, has been directly decided in the case of *Todd v. Cannon*, 8 Hum., 512.

6. It is said that lands lying in *Stewart and Weakley* were sold which are not embraced in the pe-

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tition, which is fatal. The object of the petition is to sell the whole real estate of James Winchester, which had descended to the heirs, except what was willed to his widow; and such is the decree of the Court. The case in 8 Hum., 512, describes the land as lying in the counties of Williamson, Davidson, Rutherford, Perry, and *other counties*. The omission then to state every county where the land might be situated, would not, under any circumstances, invalidate the proceedings.

7. But then it is said the petition states the heirs are the owners of "an undivided one-eighth part of 1,809 acres of land, including a part of the town of Memphis," and which undivided one-eighth is ordered to be sold by the commissioners. That they were not clothed with the power to make partition, but merely to sell an undivided one-eighth. And yet they made the sale of various lots of land in Shelby county, and town lots absolutely instead of an undivided one-eighth. But the answer to that is contained in the decree of *January Term*, 1829, ordering the sale, which says, "said commissioners are authorized to sell said tracts in such *lots or divisions* of the same as they may deem most expedient for the interests of the heirs." But without that the authority would be implied, and particularly after the sales had been made and reported to the Court in that way, and confirmed by the Court without exception, it would be no ground of error. The *irresistible presumption* is that it was for the advantage of the heirs.

8. It is said the *petition* is not in the name of the *infants*, but the *guardians*, which is not sufficient. The whole body of the petition shows the fact to be

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different—that it is in the name of *all the heirs*. The manner of signing is *mere matter of form*.

9. It is said the lands are not sufficiently *identified* in the petition. “*Id certum est quod certum reddi potest*” is a maxim which would apply to this case. The petition, the decree upon it, the report of the commissioners, which is confirmed by the Court, make it certain in regard to the lands sold.

But should a bill of review be entertained by the Court? The general provision of the 53d §, ch. 6, of the act of 1801, is a prohibition against bringing such a bill after three years. How is this qualified? “Saving to infants, *femes covert*, persons *non compos mentis*, &c., a *right to move* for a bill of review within three years after such disability shall be removed.” The act does not say they shall be entitled to said bill as a matter of right, but they shall not be prohibited from asking for it, leaving it in the power of the Court to grant or refuse such bill at their discretion. (See § 16 of the act of 1835, ch. 20, which prohibits a writ of error after twelve months.) The language used here is very different from the exception in the statute of limitations. And we see the reason of it. Here is no *cause of action* accruing to any person under a disability after the decree was pronounced, as is the case in the exception to the statute, but an *adjudication* upon the rights of parties.

But if a bill of review could be entertained in favor of these complainants after a lapse of three years, it would not now be entertained by this Court. Story’s Eq. Plea., § 756, *a*, §§ 818, 410; *Smith v. Clay*, Ambler, 645; 2 Brown’s P. C. 62; 2 Story’s Eq., §§ 1520–1522;

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1 Story's Eq., § 64, *a et seq.*; 2 Sneed, 211; 3 Ib., 157, 518; 4 Ib., 140.

Again, if any irregularities had intervened in the proceedings, it appears the property has been sold under the decree to *bona fide* purchasers nearly *thirty years ago*, who would be entitled to hold these lands; and, therefore, to review the case would be unavailing, and would not be allowed. *Burke v. Crosbee*, 1 Ball & B., 489; *Bennett v. Hamill*, 2 Scho. & Lef., 566, 577; 9 Ves., 87; *Loyd v. Johnes*, 3 John. Ch., 344; *Dinning v. Smith*.

As it regards the *new matter*, upon which complainants ask to file a *supplemental bill* in the nature of a bill of review, the Chancellor committed no error in refusing it. *First*, as it regards the alleged *idiocy of Helen M. Winchester*. That is a matter of no importance. She was a minor, and represented by her regular guardian, Lucilius Winchester, and as one of the heirs of James Winchester, the Court would have the right to decree a sale under the act of 1827, ch. 54, § 1. This is not "new matter which hath arisen in time after the decree," according to Lord BACON's ordinance.

Second. As it regards the other *new matter* stated by complainants, growing out of the alleged partitions in the County Court of Shelby, in January, 1828, and April, 1829, we say:

(1.) There is nothing alleged which shows the least ground of merit.

(2.) According to their own showing, these partitions are binding upon them. 2 Rawle, 287; 3 Pick., 396; 24 Vermont, 560.

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(3.) These proceedings were all of record, and the law will impute to them notice. There is nothing stated which shows the least diligence. Story's Eq. Plea., § 414. And again, § 417, "the granting of such a bill of review for newly discovered evidence is not a matter of right; but it rests in the sound discretion of the Court." It should, therefore, be refused in this case.

E. H. EWING, Special J., delivered the opinion of the Court.

James Winchester died in 1826, having made a will providing for his wife, and for the support of his minor children, leaving his lands (except those devised to his widow) to descend. His lands were situated in various counties of Tennessee, some of them in, and some out of the district of the Chancery Court, then held at Carthage. His heirs consisted of two adult males, two married women, several minor children, and two minor grand-children. Lucilius Winchester, one of his adult sons, became guardian for the minor children. In January, 1829, a petition was filed in the Chancery Court at Carthage, for the sale of certain lands so descended. This petition was signed by the adult sons, by the married women and their husbands, by Lucilius Winchester, as guardian for the minor children, and by Orville Shelby, who is stated in the body of the petition to be next friend, and father of said minor grand children. At the term of the Court at which this petition was filed, the Chancellor made an order decreeing the sale

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of the lands, and appointing commissioners for that purpose. This decree contains special directions as to the sale and the report, and authorizes the sale to be made by division of the lands into lots, if deemed expedient. The commissioners appointed, were Lucilius Winchester and William Cage, who made sale of the lands mentioned in the decree, and made a particular report thereof to said Court, at its July Term, 1829; they reported, also, the sale of a tract of land not mentioned in the petition, lying in Stewart county, and of two tracts in Weakley county, which it has been supposed were not mentioned in the petition. This report was not excepted to. Certain of the lands, which had been bought by Lucilius Winchester, were at said last mentioned term, ordered to be resold by said commissioners. The tract in Stewart county being an undivided half of 1000 acres, was one of the tracts purchased by said Lucilius; he was, also, the purchaser of one of the tracts in Weakley, of 100 acres, the other tract in Weakley, was bought by a third person. Said commissioners made two additional reports, showing the sale of the 100 acres in Weakley, and of the other lands ordered to be resold, except the undivided half of the 1000 acres in Stewart, which is not again mentioned in the record. These two reports have no date. At July Term, 1830, a decree was made, authorizing the commissioners to make titles upon payment of the purchase money, and requiring them to give bond in the penalty of \$25,000, to account for the proceeds of the sales. This bond was given, and a copy of it is in the record. At the July Term, 1831, commissioners were appointed to settle with Winchester and Cage, the commissioners

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of sale, and to ascertain the share of each of the heirs in the proceeds of the land. By the same decree, the report of L. Winchester and Cage, is confirmed and ordered to be enrolled. The commissioners appointed to make settlement, &c., made a report at January Term, 1832, which was confirmed, and L. Winchester and Cage ordered to pay over the proceeds of sales in accordance therewith. At the January Term, 1835, a petition was filed in the name of all of said heirs (except Lucilius Winchester, who was then dead, and who was represented by his administrator, Jo. C. Guild,) signed by counsel, stating the previous proceedings in substance, and stating the death of L. Winchester and praying to have another person appointed commissioner in his place. The Court appointed Valerius Winchester in his stead. At January Term, 1837, another petition was filed, of a similar character, stating the death of William Cage, and praying that Valerius Winchester alone, might be authorized to make titles, and it was ordered accordingly. At August Term, 1840, a similar order was made, appointing J. W. Baldridge to make titles, V. Winchester being then dead. And at February Term, 1843, Baldridge having declined to act, Alfred Wynne was appointed in his place. No further proceedings appear to have been had in the cause. There was neither appeal nor writ of error. In the summer of 1858, Mrs. Almira Wynne and Mrs. Louisa Rucker, the two married women above mentioned, by their next friend, John W. Head and Helen M. Winchester, (who alleges herself to have been an idiot from her birth, and who was one of the minors under the proceeding of 1829,) by her present guardian, George W. Winches-

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ter, applied to the Chancellor sitting at Carthage, by petition and affidavit, for leave to file their bill of review, to review the decrees of 1829, and the record aforesaid, on the ground of "new matter and newly discovered proof." And as a matter of right, (alleging in the same bill errors in law apparent upon the same record,) they file their bill, praying to have said decrees and record reviewed, and the decrees' reversed and annulled. To this bill the husbands of the said Almira and Louisa are made defendants, as are also the other heirs of said James Winchester, and also many of the purchasers and sub-purchasers of the lands. The matters assigned as error in law, in the bill and the argument, taking them up in their proper order, and not precisely in the order stated in the bill, are as follows, viz.:

1st. That the original proceeding being under the act of 1827, chap. 54, should have been a bill, and the suit "conducted as equity suits;" that a petition making no defendant, is not a bill nor a suit, and that the decrees are therefore void, and that a void decree is a proper subject of a bill of review.

2d. That if a petition be an admissible mode of proceeding, the married women should not have been joined with their husbands, but should have appeared by next friend.

3d. That Helen M., whether as idiot or minor, should not have been joined with the adult petitioners, even if a petition were a permissible mode of proceeding in some cases, and that this was error at best.

4th. That no proof appears by the decree to have

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been made, and that this is required by said act to be made to give jurisdiction.

5th. That the decree of January, 1829, does not recite the facts upon which it is founded, and that this is, and was error, according to the course of a Court of Chancery, even before the adoption of the Chancery Rule of 1830, requiring the facts to be recited, &c.

6th. That it was error to sell the lands in Stewart and Weakley, the same not being embraced in the pleadings previous to the first decree, and that this is not aided by failure to except to the report, nor by the subsequent petitions filed by the original petitioners.

7th. That Helen M. was, in fact, an idiot, as well as a minor, at the passing of the decrees, and that under the saving in the act of 1801, chap. 6 sec. 58, she may now show this fact, and that as an idiot, she had no guardian, made no appearance, and that this is error.

8th. That some of the lands were not within the chancery district, and that the Court had, therefore, no jurisdiction to sell them under the act of 1827.

9th. That the married women were not, and that they should have been privily examined.

10th. That in the petition the lands are not sufficiently identified.

11th. That it was error to sell the undivided one-eighth of 1809 acres of land in Shelby county, or to sell it as severed, when no valid partition had been made.

12th. That the petition is defective in its statement of facts, and does not come up to the requirements of the statute, in showing that partition could not advan-

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tageously be made, or that a sale was manifestly for the advantage of the parties.

13th. That no day was given to the infants in Court.

And 14th. That the complainants were not, in effect, made parties, even if petition were a proper mode of procedure.

The grounds taken in the bill of review, as one for new matter or upon new proof are :

1st. That the interest of the heirs in the 1309 acres of land near Memphis, was one-fourth instead of one-eighth, as stated in the petition, and that this has been lately discovered.

2d. That after the decree for sale at Carthage, a proceeding which was void, took place in the County Court of Shelby county, for the division of the said tract of 1309 acres, and that one-eighth in severalty, was assigned, under this proceeding, to the heirs of Jas. Winchester, that this one-eighth, as assigned, was sold by the commissioners, instead of an undivided one-eighth, and that this fact was only lately discovered by said complainants, through their counsel and next friend, who makes the affidavit.

3d. That a similar proceeding in the County Court of Shelby, had taken place in regard to the tract of land called in the petition at Carthage, 252 acres lying in Shelby county ; that this proceeding, though before the first decree, was void, and that in fact the heirs of Winchester, instead of owning this 252 acres in severalty, owned an undivided forty-ninth part of a 5000 acre tract near Memphis, and that this was only lately discovered, &c.

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4th. That the lands in Stewart and Weakley were sold without authority, and this has just been discovered. The application for leave to file the bill of review, as for new matter and upon new proof, was made to the Chancellor sitting at Carthage, at the August Term, 1858. Leave was refused. The bill was then filed as for errors apparent on the face of the decrees, or upon the record; whereupon, (it is said in the decree of the Chancellor, "upon inspection of the bill of review and of the original record,") the bill of review was dismissed. From this decree refusing to permit the filing of the bill, as for new matter or new proof, and dismissing the bill as filed for errors apparent, &c., the complainants have appealed to this Court.

No objection is taken to the ruling of the Chancellor, upon the ground that his action was premature in dismissing the bill as for errors apparent, &c.; though it is said, it would have been more proper in form, that he should have waited for process bringing in the defendants, and a motion by them to dismiss or a demurrer. This informality, if it be such, need not, therefore, be noticed.

It is, however, objected, *in limine*, by the defendants, the purchasers of the lands, that under the act of 1801, regulating the practice in Courts of Chancery, chap. 6, sec. 58, and the clause saving the rights of married women, &c.; no bill of review can be filed, either for new matter or for errors apparent, &c., without leave of the Court first had and obtained. The clause referred to, and the previous clause, are as follows, viz.: "Provided that no bill of review shall be brought, or a motion made therefor, except within three years from the time

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of pronouncing such decree, saving to infants, *femes covert*, persons *non compos mentis*, &c., a right to move for a bill of review within three years after such disability shall have been removed." It is urged with much force, and no little plausibility, that though the filing a bill of review for errors apparent, &c., within three years, is matter of right under the statute, that such *right* was not intended to be extended to those under disability for an indefinite time; and to sustain this view, attention is called to the difference of the words in the two clauses. In the one, the words used are, "shall be brought or a motion made therefor;" in the other, "saving to infants, &c., a right to move." It is insisted that these last words imply a discretion and control on the part of the Court, and that it might well be supposed that the Legislature looking to the intervention of new rights and interests in the long lapse of time, that might occur in many cases, before the removal of a disability, would not make the saving complete to the disabled party, as if his bill had been brought within three years. Again, it is urged as a probable construction, that the saving does not, in any manner, embrace a bill of review for errors apparent, &c.; that by the use of the word "move," it is evinced that it was only the intention to reserve the rights of a party in that description of bill of review, wherein leave of the Court was necessary. Appreciating the force of this reasoning, we are not, however, prepared to say that the construction insisted upon is correct; on the contrary, in analogy to other statutes of limitation, where rights of infants, &c., are saved, and taking into consideration the general doctrine that persons under dis-

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ability cannot, ordinarily, have *laches* imputed to them, we are of opinion that the words, "a right to move for a bill of review," are to be held equivalent to the words, "a right to move for a review," &c. Besides, we think, that if so important a distinction was intended to be taken, it would have been more clearly announced, and not have been left to ingenious construction. To exclude altogether, a right to file a bill of review for errors apparent, &c., after three years, according to the second construction above referred to, would be to place infants, &c., upon the same footing, in this regard, as adults, which it is not to be supposed has been done, where there is at least a seeming reservation in their favor, unless such construction is demanded by the highest considerations of public policy. A second objection taken to the bill of review in this case is, that the husbands should sue jointly with their wives, and that as the husbands are not within the saving of the act of 1801, the bill cannot be filed so far as the married women are concerned, until the removal of the disability. It is true, as a general rule in equity, as well as at law, that the husband must join in the suit; see Story's Eq. Pl., sec. 61. To this rule, however, there are many exceptions, and whenever it is necessary for the protection of the wife's interest, the Court will change the parties, making the one or the other complainant or defendant, according to the exigency of the case. In this case there would seem to be some antagonism between the interests of the husband and wife. The husband has received the proceeds of her land, which he or his estate might be made to account for, in case of a reversal of the decree under which it was sold. In this

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case too, the husband, by his *laches*, has placed himself in an attitude where he cannot join his wife, and yet, though he has lost his own rights, hers remain in full force, and it would certainly be pressing the rule, requiring the husband to join (which is, in part, generally for the protection of the wife) to a strange consequence, if it could be used for her injury. The case of a bill of review, is not analogous to that of a suit for the land, where the joint estate is barred, and where neither can sue.

In other respects, in regard to the form of the proceeding, there does not appear to be any valid objection. There was a petition and affidavit, an offer to secure costs and other sums of money which might be required to be paid, and also security for costs of the bill filed as of common right. A remark may, however, be proper as to the junction of the two kinds of causes for review in the same bill. There would seem to be no objection in reason, to such a course, and the point has been so adjudged in the case of *Colville v. Colville*, 9 Hum., 526, and recognized at last term, in the case of *Richmond v. Syfert*, M. S. Indeed no objection is made here on this account.

This brings us to the consideration of the substance of the bill of review. Can this bill be sustained as founded upon new matter or new proof? The ordinance of Lord Bacon will be found at large, in the case of *Eaton v. Dickinson*, 3 Sneed, 401, and need not be repeated here. Such a bill must be for "new matter which hath arisen in time after the decree," or, "upon new proof that is come to light after the decree was made, which could not possibly have been used when the

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decree passed," and can only be filed "by special license of the Court, and not otherwise." It may also be remarked, that the new matter or new proof must be such as would have affected or altered the decree if offered at the time the "decree passed;" in other words, it must be relevant and material. In regard to the new matter and new proof, it is said by complainants, that two of them are married women, that they were so at the time of the decree, and have since so remained, that the other is an idiot, and has been such since her birth, and that no *laches* can be imputed to them. Certainly it is always a consideration where a demand is made after a great lapse of time, that the party making it has been, during the whole time, laboring under a legal disability. Parties in such situations do not, however, in many instances, wholly escape the consequences of neglect or inattention on the part of those whose duty it was to protect their interests. We feel fully the difficulty of attempting to eliminate any general principle from the multitude of cases to be found in the books upon the subject of *laches*. Each case has been made to depend, in a great degree, upon its special circumstances, and too much, perhaps, upon the particular consequences which might arise from the decision. In reason, surely *laches* should be imputed rather to an adult male, than to a married woman; to a married woman, ordinarily, rather than to an infant, to either of the two last, rather than to an idiot. But no general rule of a practical nature, can be safely laid down, nor is it to be expected, that abstract justice, after a great lapse of time, can, in all cases, be reached for all parties concerned in a cause.

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It will be, perhaps, agreed on all hands, that the proceedings of Courts of Justice of general jurisdiction, should have greater benefit from presumptions, and the curing hand of time, than acts or omissions in private transactions. Representation in Courts of Justice, is a necessity of civilized society, and the acts or neglects of the representative must, in some degree, be binding upon the party represented. In this view, then, is it enough that John W. Head, at present the next friend of the married women, and George W. Winchester, at present the guardian of Helen M., who is said to be an idiot, should make an affidavit that the new matter and new proof have lately come to their knowledge? Should we not have the affidavits of the married women themselves, and of their husbands, who were parties to the original petition, especially of Alfred Wynne, who was appointed under one of the decrees to make title? Should we not inquire what was the knowledge of Lucilius Winchester, who was, at the time of the decree and afterwards, guardian for Helen M.? What the knowledge of John J. White, who was their solicitor? The knowledge of Lucilius Winchester must have extended to all of the matters now alleged as newly discovered. As commissioner, he sold the lands in Weakley and Stewart, and also the lands in Shelby, according to the assignment made under the so-called partition made in the County Court of that county. He sold an eighth instead of a fourth of the 1809 acres, in the face of the fact that two-eighths were laid off to Winchester's heirs; he sold the 252 acres, as laid off in severalty. His brother, Valerius, conveyed the eighth left by him, as upon the bond of their father, and which bond it is not *denied*, at some

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time, had an existence. In addition to these things, after all of these sales were made and reported, two petitions were filed by all of the heirs, recognizing them. It is too late for the married women to say that these things were newly discovered. It is true, that if the idiot is to be bound at all, it must be upon the knowledge of her agents and representatives, and in the absence of all fraud and collusion, we think she must be so bound. In accordance with this view, is the case of *Sheffield v. The Duchess of Buckingham*, decided by Lord Hardwicke. Hardwicke's Ch. R., page 684. He says in that case, in substance, that it is the knowledge of those who were parties at the time, their guardians and agents, and not of subsequent solicitors or the heirs of the original parties that should be looked to.

But how have the complainants been aggrieved by their alleged want of knowledge. It is not alleged that it would have been better for them that the one-eighth of 1309 acres should have been sold undivided, than that it should have been assigned to them, and sold in town lots. It is not alleged that they did not get one full eighth in the division. As to the other eighth, if that has been improperly conveyed by their brother Valerius, the decrees in the original case have nothing to do with it, and do not throw even a cloud over their right. If it were error to have sold an undivided eighth of a tract of land, or to have sold the eighth severed, and in parcels, under a void division, that is for the other branch of the case. The same remark will apply to the 252 acres in Shelby county, part of the Ramsay grant. As to the lands in Stewart and Weakley, if they were sold without authority, all possible benefit that could be derived from

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a bill for new matter, can be had upon that part of the bill which proceeds for errors apparent upon the face of the decrees. But in fact, in regard to these lands, the record would seem to show some things that appear to have escaped counsel on both sides. As to the undivided half of 1000 acres in Stewart, purchased by Lucilius Winchester; this, though ordered to be resold, was never in fact, resold at all. As to the two tracts in Weakley, they are both described in the petition, though, perhaps, erroneously stated to lie in Henry county, in which county they probably were at the time of their location, though probably also in Weakley, a new county, at the time of their sale. The misdescription in the petition, in any event, would be cured by the report and its confirmation, as decided in *Todd v. Cannon*, 8 Hum. At last, is this new matter, in the sense of the ordinance? If it be used to impeach the decree of July, 1829, it cannot affect it, as the so-called new matter is nothing but action under that decree, which, whether erroneous or not, could not impugn it. If it be used to impugn subsequent decrees, then, as to them, it is not new matter, as it had already arisen in time, &c. Upon these matters as new proof come to light, &c., we have already sufficiently commented. The idiocy of Helen, is neither new matter, nor is the proof of it alleged to be newly discovered. Upon her rights as an idiot, something is said in another part of this opinion.

Leave to file the bill for new matter was addressed to the sound discretion of the Chancellor, which leave, we think, was properly refused. How far length of time, change of circumstances, the intervention of new rights and interests, might be looked to in weighing the

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propriety of granting such leave, it is not necessary in this case to consider, as there are sufficient grounds to refuse the leave without taking into account such considerations. It may well be said, however, that where even a legal discretion is to be exercised, that it will bear debate, whether the interests of two or three innocent persons should be suffered to outweigh those of a hundred others equally without fault, but in a less favorable legal position. Should not the complaining parties be left to the inflexible rules of law to work out their stern claim. It remains to consider, whether the proceedings in the Chancery Court, at Carthage, are erroneous, and if so, whether the errors are of such a character as can affect *bona fide* purchasers of the land under the decrees. I say *bona fide* purchasers of the land, because no error is alleged affecting the original parties to the cause. All the parties were petitioners, and all aggrieved in equal degree and in like manner, by the decrees and sales, however their rights might now vary, some being bound, and others not; some barred, and others not. No allegation is made of unfairness on the part of purchasers, or of collusion by or with any one, and no grievance is alleged, except that some of the lands have greatly risen in value.

The first error in order, as already stated, is, that the proceeding was by petition, and not by bill; and that the case was not conducted as other suits in equity, as required by the act of 1827, already referred to. This is a question which presented some difficulty to the member of the Court who writes this opinion; his impression had been that a proceeding *inter partes* was contemplated by the act, and that a petition was, at

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best, barely permissible under its provisions. He knew that the practice of filing petitions was sanctioned, however, by many of the ablest members of the Bar.

In the origin of the Court of Chancery, so far as we are able to discover, the first step was a petition to the Chancellor, complaining of some wrong done, or of some right withheld, and asking that the defendant might be brought before him. No distinction seems then to have been taken between the terms petition and bill. Later, and when form had somewhat advanced, and when the subpoena had been introduced, proceedings of this description were required to be in English; and from that time the petition or bill began to be called an "English bill," and, finally, simply a bill, or bill in equity, the name petition having been dropped for an original proceeding. Petitions, as we find the word now used in works upon pleading and practice, are confined to applications of an interlocutory character pending a suit in equity, or, in England, to cases of special jurisdiction under acts of Parliament, where this mode of proceeding is directly indicated or necessarily implied. Dan. Ch. Pr., 1801. Under what are called the inherent powers of a Court of Chancery, it is not easy to conceive a case which would not require parties complainant and defendant. The proceeding is always to assert some right denied, or to have some wrong redressed by another. This is not necessarily so under our act of 1827. It may be necessary and proper to proceed under it when there is neither right withheld nor wrong done; but where there exists merely the *vis inertiae* of disability, and where the advantage to the disabled party, of a sale, may be as great as to the party who

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is *sui juris*. There may be, and are, cases of sole owners of property who labor under disability, and whose lands it would be proper to sell. A petitioner (*not sui juris*) jointly with others, though not so conveniently or availably under the protection of the Court as if he were a defendant brought in by process with either a general guardian or guardian *ad litem*, is still under its shield, and his *prochein ami* may be made to subserve his interest.

A subsequent Legislature seems to have regarded the mode of procedure proper to sell lands of infants under the act of 1827, as either by bill or petition. By the 18th section of the act of 1835, ch. 20, exclusive original jurisdiction is given to the Chancery Court of all cases in equity to be commenced by bill, petition, or otherwise, except petitions or bills for the partition or sale of real estate, &c. The case of *G. C. Brown*, 8 Hum., 207, is a case where a petition was filed by a minor, by his guardian, to sell land of which he was sole owner; and this was decided to be competent under the act of 1827. No question was made as to the propriety of proceeding by petition, although it was necessarily involved in the case, as he must proceed in that way if he proceeded at all. This case was recognized as law at the last term in the case of *Hickman v. Brunson*, though this point was not alluded to. In the same volume of Humphries' Reports is the case of *Blackmore v. Shelby*, page 439. This was a case decided upon a petition, filed in the Circuit Court of Montgomery by adult males, married women joining their husbands, and minors by their guardian; and the proceeding was held good. Finally, at the last term of this Court, the case

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of *Davidson v. Bowden et al.*, was decided, where the petition was of a similar character with the last, and though the petition was dismissed for other causes, and it was held to be error to make such a joinder of parties, the proceeding by petition was not held to be void. The mode of proceeding by petition seems to be practiced in North Carolina upon a statute similar to ours, (see 2 Dev. & Bat. Eq., 68,) though it does not appear that it is required there to proceed by bill, or that the suit is to be conducted as other suits in equity. The point presented in this case seems not heretofore to have been directly made upon the act of 1827. We are of opinion, however, that it would be going too far now, after what has been already shown, to declare a proceeding by petition under the act of 1827, void. It is not, however, intended to disturb the decision of the Court in *Davidson v. Bowden et al.* It is still held that it is error to file a petition embracing adults, married women and their husbands, and minors together, and that the most proper mode of proceeding under the act of 1727, where minors are interested, is by bill *inter partes*, and making the minors defendants.

The second matter assigned as error is, that the married women were joined with their husbands in the petition. We deem this not only no error, but there is some doubt whether it would not have been error if they had not been so joined. The subject matter was not the separate estate of the wife, and she had no interest antagonistic to that of her husband. Story's Eq. Pl., § 61. Such joinder was in accordance with the general practice in this State.

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Upon the third matter assigned as error, upon the reasoning already offered and upon the authority of the case of *Davidson v. Bowden et al.*, above referred to, we are of opinion that the joining of Helen M., as a minor, with the others, was erroneous. The fourth and fifth matters assigned as error will be considered together.

According to the case of *Eaton v. Dickinson*, it is not competent to look to the proof upon a bill of review. It is sufficient, if the decree is consistent with itself and the pleadings. It is insisted, however, that it should appear in the decree itself that "satisfactory proof" was made, or that enough is not recited to give the Court jurisdiction, for that the jurisdiction given by the act of 1827 is a special jurisdiction, and not (according to a remark of Judge REESE, in the case of *Norment v. Wilson*, 5 Hum., 311) to be given any amplitude of construction. The case of *Davidson v. Bowden et al.*, is also referred to upon this point. Consistently with both of those cases, the decree in this case, we think, may be supported. The statement in the decree, "the Court being satisfied of the truth of said petition, and that it is for the manifest advantage of the heirs that said lands be sold," we regard as equivalent to the statement that it appeared to the Court that the facts stated, &c., were true. The statement that they appeared to the Court, or that the Court was satisfied, &c., could not be made with truth, if the facts appeared otherwise than by proof, as their appearing in any other way would have been equivalent to their not appearing at all. In the case of *Davidson v. Bowden*, the questions came up upon a bill by the purchasers, while the original cause was still in Court, and the proceedings being still

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in fieri, the matters were examined as upon writ of error or appeal. What was called the proof was looked at and compared with the decree, and in that case it is said the decree itself, in general terms, ordered the sale without the statement of any facts, or expression of any opinion that the lands could not properly be partitioned, or that it was for the interest of the minors. It is said, however, that independently of the act of 1827, and upon the general requirements of a Court of Equity, the facts upon which a decree is founded should be stated in it, and that none are stated in this decree. It will be observed that this decree was passed before the adoption of the Chancery rule of 1830, requiring the facts to be stated in the decree. Subsequently to the adoption of this rule, and upon a case arising under it, the cause of *Burdine v. Shelton* came before this Court, (see 10 Yer., p. 41.) and there the decree sought to be reviewed stated that the cause "came on to be heard upon the pleadings and proof, &c., and the matters being considered and fully understood by the Court, the Court thinks proper to order and decree." The Court held that this was not a sufficient statement of facts within the rule, and perhaps would have held that it was not sufficient before the rule. It is not very clear what were the requirements in this respect before the adoption of the rule of 1830. There had not, perhaps, been any very well settled practice in Tennessee. Mr. Story, in his *Equity Pleadings*, § 407, says: "In England decrees are usually drawn up with a special statement of, or reference to the material grounds of fact which support the decree. In the Courts of the United States, the decrees are

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usually general, without any such statement of facts." Again he says, (upon a bill of review,) "taking the facts to be as they are stated to be upon the face of the decree, you must show that the Court have erred in point of law. If, therefore, the decree do not contain a statement of the material facts on which the decree proceeds, it is plain that there can be no relief by a bill of review, but only by an appeal to some superior tribunal." He refers to *Dexter v. Arnold*, 5 Mason R., 311. In the case of *Whiting v. The Bank of the U. S.*, 18 Peters, p. 6, &c., the Court say: "In America the decree does not, ordinarily, recite either the bill, answer, or pleadings, and, generally, not the facts upon which the decree is founded." Upon this decree, then, made before the adoption of our rule of 1830, it is believed the recital is sufficient. Its statements are equivalent to the statement, it appeared to the Court that the facts stated in the petition are true; and thereupon the Court, first expressing an opinion that the sale would be proper, proceeds to decree. In *Burdine v. Shelton*, nothing is stated to have appeared to the Court, nor is any opinion expressed. From the intimation in that opinion, the decree in this case would, probably, have been held good under the rule of 1830. The decision of this point, from the existing state of the law, can, probably, have but little effect beyond the present case.

Upon the sixth ground of error enough has been already said to show that this assignment is made from a mistake in the examination of the record. The land in Stewart was, in fact, never resold, and the lands in Weakley were only misdescribed, which misdescription was corrected by the report.

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Seventh. Was it error that Helen M. Winchester appeared as a minor, by her guardian as such, when she was in fact an idiot, (as well as a minor,) and had no guardian as such? It has been already said that she could not take advantage of this upon a bill of review for new matter. Is it error apparent on the decree? It does not appear at all in the proceedings, and can not, therefore, be error apparent, &c. If error at all, it is error in fact, and would be ground for an original bill, either in the nature of a bill of review or otherwise. Upon the effect of such an error, if it be one, this case does not demand a decision.

The eighth ground of error is, that some of the lands were not in the Chancery district. This was not material. Some of the lands *were* within the district, and certainly it was not intended by the Legislature that there should be as many bills as there were tracts of land in different districts or counties. Besides, this has been decided not to be error in the case of *Todd v. Cannon*, 8 Ham., above referred to. And such has, as I am informed by my brethren, been the practice of the Court.

The ninth cause assigned for error is, that the married women were not privily examined in regard to their consent to pass their real estate. These lands were derived by descent, and were not the separate estate of the wives. There are many cases in which wives have been privily examined in Court in regard to the passing of their separate estates, in regard to their waiver of an equitable settlement, &c., &c., but there is no case known to the Court where the wife has been so examined where it has been sought to divest her of

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mere legal interest in land held jointly with her husband. Since the passage of the act of 1801, § 48, authorizing the divestiture of title as a substitute for conveyance, the mode of compelling a conveyance by attachment has fallen altogether into desuetude, and could not now be lawfully resorted to, and, perhaps, never could have been brought to bear directly against a married woman. She, under the old mode of proceeding, could only be made to suffer vicariously by laying the husband by the heels, and this in *all* cases was not an effectual remedy. Suppose, under the act of 1827, a married woman should be unwilling to have her land sold, and should therefore by the other tenants in common be made a defendant, could not her interest in the land be divested without a privy examination? It would seem that it could, or the statute would be wholly nugatory. Suppose two married women to be tenants in common of a tract of land which must be sold for partition, one or the other must be complainant. Can one demand against the other a divestiture of title by decree when her own estate can only be parted with by privy examination? Whether a married woman should be privily examined or not can not, certainly, depend upon her accidental position in the suit as complainant or defendant. When a bill is filed in a Court of Chancery by the husband, in the name of himself and wife, it is sometimes called the suit of the husband, and the wife is in many cases not in all respects bound by such suit. Ordinarily, however, as already remarked, in cases where their interests are not antagonistic, a joining is not only proper, but necessary. Our act of 1827 was for convenience, intended to act by divestiture of title by decree, and it chooses to re-

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pose some confidence in the conjugal relation, and not to regard husband and wife as occupying that attitude militant which some of our law books seem to countenance, and which the civil law directly encourages.

The objection that the lands are not sufficiently identified comes, certainly, too late upon a bill of review, after the special reports and other proceedings by which this cause of objection, if it existed, was thoroughly obviated. A demurrer for this cause might have deserved some consideration. *Todd v. Cannon*, 8 Hum.

Was it error to direct the sale of an undivided one-eighth of 1,309 acres of land near Memphis? Such a decree would not be void under the act of 1827, as it is a present interest, embarrassed only by its connection with other claimants. Yet, certainly, such a mode of sale would not be favored upon appeal or writ of error, and would probably be held erroneous. We see, however, in fact, by the subsequent proceedings in the cause, that this one-eighth had been severed from the other portions of the land, whether by a valid proceeding or not it is not necessary to inquire as it was for the benefit of complainants, the sale of it, in its severed form, was reported and confirmed, and two petitions filed recognizing such severance and sale. The parties were not aggrieved by it in fact, nor do they now claim that they were aggrieved by it. *Story's Eq. Pl.*, § 409.

The case for a sale, it is said, is not stated with sufficient certainty in the petition. This is but faintly insisted upon; and, indeed, upon looking into the petition, we see nothing to ground it upon. It would not have been good upon special demurrer. The petition

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complies, in this respect, with all of the requisitions of the statute.

Something was said of a day in Court for the infants. The doctrine upon that subject has no application where title is divested by decree, but only where the infant is directed to convey. This was held in England so long ago as the time of Lord Hardwicke, who says in *Sheffield v. The Duchess of Buckingham*, already referred to, "I take it to be the course of the Court not to give day unless a conveyance is directed either in form or in substance."

The last objection is one that, if well founded, would seriously affect the whole proceeding. It is, that the present complainants were not made parties to the petition. It is admitted for the idiot complainant, that the petition was signed by her guardian, stating that he signed as well for himself as for her; and it is also not denied, though evasively admitted by the married women, that it was signed by them. Now the petition sets out "your petitioners, the undersigned," and this would seem to embrace the married women. They too are, together with Helen M., named in the petition as heirs of James Winchester. In another part of the petition it is said, "your petitioners represent unto your honor that the following real estate has descended to them as heirs of the said James." Again, it is said in the petition, "so far as the minor heirs are concerned, it is equally for their interest, with that of the rest of your petitioners." Thus identifying the petitioners with the heirs. The form of signing by the guardian is certainly not material; whether he signed Lucilius Winchester for Helen M. or Helen M. by Lucilius. Sub-

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stantially the petition is as good as if it had set out "your petitioners, A., B., C., D.," &c.

How far can the errors and irregularities in the proceedings at Carthage be examined by bill of review? It has been strongly insisted for complainants, that for errors apparent on the face of the record a bill of review stands upon the same footing as a writ of error; that the discovery of error must necessarily be followed by reversal. This position is not favored by the reflection that for a writ of error only one year is allowed, with no saving for persons under disability, and that for a bill of review three years are allowed, with an indefinite saving for persons disabled. And this was so previously to the act of 1835, when a writ of error could not be used to examine into the facts of the case. In the view of the complainants a bill of review may have the effect against the original parties of reversing so much of the proceedings as were erroneous, and of striking from under third parties, purchasers, and others, the only prop of their titles; in effect, as to them, of declaring the whole proceedings void.

Now we think it may be laid down as a general rule, that whenever a Court of Chancery, or other Court of general jurisdiction, possesses jurisdiction of the subject matter of litigation, and has acquired jurisdiction of the parties, that as to third parties interested under its judgments and decrees, its proceedings cannot be held to be void after a final disposition of a cause. And, in this respect, it is not material whether the jurisdiction be inherent or statutory, provided the statute be of a general and public nature. To this, as a general proposition, a general assent may be given; and still it may

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be urged, that for consequences a Court is not responsible, nor can they be looked to, that error authoritatively demands reversal.

It has been urged upon some general expressions in elementary writers, that when a decree has been executed the party complaining may, upon reversal, be put into the situation in which he would have been, if the decree had not been executed. The expression thus used, (among others by Mr. Story, in his Eq. Pl., sec. 420,) we apprehend relates only to the original parties to the decree. He is only taking a distinction in general between decrees not executed, and those which had been executed. If it is to be given a larger scope, it is not sustained by authority. Now in this case, no grievance is complained of under the execution of the original decree, by one of the parties against another, and evidently the purchasers, or some of them, are made parties to affect them, and they alone can be affected.

If a reversal is not to affect purchasers in this case, it would be idle and nugatory, or possibly hereafter embarrassing. If it is to affect them, and them alone, then can a reversal be had?

If we appeal to reason, as upon a case of first impression, it would seem to be too much to expect, that a purchaser at a chancery sale should be bound to take notice, not only that the Court had authority to make it, but that it had pursued that authority with technical nicety and regularity through all the intricacies of a chancery law-suit. If, in addition, the purchaser should know that irregularities and errors might be visited upon him, not when the transaction was fresh and his condition in a great degree unchanged, but

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even at the end of a long life, or upon his children after his death, it would throw a burden and a check upon public sales that would materially clog the wheels of public justice, and injuriously affect the interests of parties litigant. Upon this question, however, we are not without authority. The case of *Bennett v. Hamill*, 2 Sch. & Lef., 577, is one where a bill was filed by Bennett to impeach a decree, (made during his infancy,) for fraud and error, and to have a sale, made under it, set aside. The Chancellor, Lord Redesdale, "a great name in the law," was of opinion that there had been both fraud and error in the original proceedings, the fraud not, however, affecting the purchaser. He says, "I must confess, after considering this a good deal, I think it would be too much to say that a purchaser under a decree of that description, can be bound to look into all these circumstances; if he is, he must go through all the proceedings, from the beginning to the end; and have the opinion of the Court that the decree is right in all its parts, and that it would be impossible to alter it in any respect. The cases warrant no such opinion. On the contrary, as far as I can find, the general impression they give is, that the purchaser has a right to presume that the Court has taken the steps necessary to investigate the rights of the parties, and that it has, on that investigation, properly decreed a sale; then he is to *see* that this is a decree binding the parties claiming the estate, that is, to see that all proper parties to be bound, are before the Court." In such a case, he concludes, that though the decree may be erroneous, the title of the purchaser ought not to be invalidated. In strictness, it is true, this was not a bill

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of review, but an original in the nature of a bill of review, and perhaps on this account stronger than the case now before the Court. In this opinion of Lord Redesdale, he refers to the case of *Lloyd v. Johnes*, before Lord Eldon, 9 Ves., 37, and says that it was a case fully considered, and where the irregularity in the proceedings was far beyond that in *Bennett v. Hamill*, and yet Lord Eldon conceived that the title of the purchaser could not be impeached on these grounds, "that he had a right to be protected, for that a purchaser had a right to presume that the Court had done right."

These cases are mentioned with approval by Chancellor Kent, in *Denning v. Smith*, 3 Johns Ch. R., 344.

In the case of *Whiting et al. v. The Bank of U. S.*, 9 Peters, 11, decided by Judge Story, the bill, though not altogether in form, was, in substance, a bill of review. It was the case of a sale by decree of Court under a mortgage. The bill of review was filed by parties who were heirs of one Whiting, who, though not owner, had an interest in the land sold. The decree of foreclosure was made before Whiting's death; the sale afterwards, without revivor against his heirs. In the original case, one Breckenridge had not been made a party, who, the Court said, should properly have been a party. In speaking of the decree of foreclosure as final, the Judge says: "The defendants had a right to appeal from that decree as final upon the merits, as soon as it was pronounced, in order to prevent an irreparable mischief to themselves. For if the sale had been completed under the decree, the title of the purchaser

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would not have been overthrown or invalidated, even by a reversal of the decree." Again, in speaking of Breckenridge's not having been a party, he says: "We think, therefore, that this error, if any there be, not being to the prejudice of complainants, cannot furnish any ground for them to maintain the present bill; for no party to a decree can, by the general principles of equity, claim a reversal of a decree upon a bill of review, unless he has been aggrieved by it, whatever may have been his rights to insist on the error at the original hearing, or on an appeal." As to the omission to revive against Whiting's heirs, the Judge says: "If then the original decree was unobjectionable and conclusive; if there has been no fraud in the subsequent sale, pursuant to that decree, and if there has been in a legal sense," (this refers to the sale under which this property was probably sacrificed,) "no prejudice to any of the rights of the plaintiffs in the original decree, or the sale then, although there was no revivor, there is no error upon which a bill of review will lie, to entitle the parties to a reversal." Without saying whether this was error or not, the Court "does mean to say that the non-revival was not matter of error, for which the proceeding on the sale under the original decree (for that is all which the present bill seeks to redress) can, or ought to be reversed." The same principle in regard to *bona fide* purchasers is sustained, though not upon bills of review, in two cases in Kentucky, one of *Amos v. Stockton*, 5 J. J. Marsh., 638, and the other of *Kercheval v. Berry*, 6 J. J. Marsh., 508; these cases were decided upon writs of error, the writ of error, as it

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is believed in Kentucky, reaching only error upon the face of the record, as in a bill of review.

There is one case cited in complainant's brief, which would seem, at first view, to be in conflict with this doctrine, but which, when rightly looked at, is by no means at variance with it. It is the case of the *Bank of U. S. v. Ritchie*, 8 Peters, 140. It was a case where an administrator to an estate had purchased the land of his intestate fraudulently, under a decree in a cause to which he was a party. The proceedings were reversed upon review, and the sale set aside. The administrator was in no sense a *bona fide* purchaser; being an original party, he had actual notice of all the proceedings, and was guilty also of acts of bad faith.

In the case now before the Court, the whole object of review and reversal is, manifestly, to affect the purchasers at the sale. No fraud is charged against them, nor against any one else. The complainants are not shown to have been aggrieved by any error in the record, unless it be a grievance that the property has since risen in value. If the reversal is not to affect the purchasers, it would be but a barren and bootless victory, giving hopes that might lead to litigation and embarrassment, but which must result in injury to all concerned.

It is urged, however, that the Court can neither look to consequences, nor to the statements in the bill of review, except so far as those statements are rigidly connected with the question of error apparent on the face of the record, so far as that part of the case is concerned. To the first of these propositions, we do not unqualifiedly assent, and we think we are sustained in this, both by reason and authority; to the second, we

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may assent without affecting the conclusions to which we are brought.

Upon the whole matter then, we are of opinion that there was no error in the decree of the Chancellor; that leave was properly refused to file this as a bill of review for new matter or upon new proof, and that when filed as for errors apparent on the face of the record, it was properly dismissed.

Let the decree be affirmed.

JAMES C. WORD v. WM. CAVIN.

1. **WARRANTY.** *When the law implies a warranty of title in the sale of personal property.* If a party sells *personal* property, of which he is owner at the time, and which is in his possession, without any express warranty of title, the law implies such warranty, and the seller is responsible to the purchaser, in damages, for the breach of such implied undertaking.
2. **SAME.** *Warranty implied if not expressed in the written contract.* If the contract of sale is in writing and under seal, and does not contain any express covenant as to the title, yet the law, in order to give a proper force and effect to the contract, and to discourage dishonesty and bad faith, will create and supply, as a necessary result and consequence of the contract, the covenants of warranty of title.
3. **SAME.** *When there is a breach of the warranty of title.* A warranty of title, either express or implied, in view of the law, is broken the instant it is made, if the title were in a third person. Upon the possession of the property being lost, or upon a voluntary offer to restore it to the seller in disaffirmance of the contract, the purchaser has an immediate right of action upon such warranty.
4. **STATUTE OF LIMITATIONS.** *When it begins to run.* The purchaser thus having a right of action, upon being dispossessed or offering to

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return the property, the statute of limitations begins to run, and will bar his right of recovery on the warranty, against his vendee, after the lapse of six years.

FROM BEDFORD.

This cause was tried at the August Term, 1858, before DAVIDSON, J., and resulted in a verdict and judgment for the defendant. The plaintiff appealed.

E. COOPER, for the plaintiff.

W. H. WISENER, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an action of debt, founded upon an implied warranty of title to a slave, brought in the Circuit Court of Bedford, on the 14th day of May, 1856. The main question to be determined is, whether or not the action is barred by the statute of limitations of six years.

On the 15th of January, 1850, the defendant and his wife sold and conveyed to plaintiff, by a bill of sale under seal, a negro man named Tom, for the consideration of \$800.00. And therein warranted the slave to be sound, and a slave for life; but made no warranty of title. The defendant, it is admitted, was in possession of the slave at the time of the sale, and delivered him to the plaintiff.

On the 11th of February, 1850, less than a month after

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the sale, one Sarah Burdett, to whom the slave really belonged, as it seems, instituted an action of replevin against the plaintiff for his recovery. And on the same day on which the suit was commenced, the slave was taken by the sheriff, under the writ of replevin, and delivered to Mrs. Burdett, whose title was established by the verdict and judgment in the case on the final trial. Owing to the absence of the defendant beyond the limits of this State, the present suit was not sooner commenced, as it is alleged.

The jury were instructed, that notwithstanding the bill of sale was silent as to the *title*, an action might be maintained on an implied warranty of title; and that if the title to the slave was in another person at the time of the sale, the implied warranty was broken at the instant it was made, and the plaintiff would then have a right of action, against which the statute of limitations would begin to operate.

As regards the sale of *personal* property, the settled rule is, that if one sells goods or chattels as owner, being clothed with visible ownership or possession at the time of the sale, he impliedly undertakes and promises, though nothing be stipulated or said upon the subject, that the goods or chattels are his property, and that he has a lawful right to make the sale and transfer he proposes to make; and if he were not the owner at the time of the sale, and the property was in a third person, who subsequently claims and deprives the purchaser of it, the seller will be responsible in damages for the breach of such implied undertaking. Addison on Con., 268-55.

This principle does not apply where the seller is not

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in possession of the property at the time of the sale, nor where the person does not sell *as owner* of the property; but in some special character or capacity, and this is known to the purchaser. In such case, the purchaser is bound to look into the title of his vendor. *Id.*

And it is clear, that although the terms of a written contract, though it be under seal, do not in themselves, contain or import any express covenant as to the title, yet the law, in order to give a proper force and effect to the contract, and to discourage dishonesty and bad faith, will create and supply as a necessary result and consequence of the contract, certain covenants and obligations, which will bind the parties as effectually as if they had been expressed in the strongest and most explicit terms. *Id.*, 49.

This doctrine is not at variance with any established principle of the law. It is not adding a new term to the agreement of the parties, in the sense of the law; nor is it any infringement of the principle that parol evidence is inadmissible to enlarge or vary the written agreement of the parties, because such implied covenant is regarded as an inherent term of the contract, not necessary to be expressed, and having the same force as if stated in terms.

But it is argued, that the Court erred in laying down the rule, that if the property were not in the seller at the time of the contract, the implied covenant of warranty was broken when made, and the plaintiff would have an immediate right of action thereon.

The possession of the slave having been transferred to the purchaser at the time of the contract, it would

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seem to be competent for him, on ascertaining the fact that the title was in a third person, to repudiate the contract, and return, or offer to return, the property to the seller; and thereupon, without waiting to be dispossessed by the paramount title, to institute his action for the breach of the implied warranty. The implied stipulation, resulting from the contract, that the property was in the seller, and that he had a lawful right to make the sale and transfer thereof, which he assumed to make to the purchaser, is undoubtedly false, and in view of the law, is broken the instant it is made, if the title were in a third person. And upon the possession being lost, or, upon a voluntary offer to restore it to the seller, in disaffirmance of the fraudulent contract, the purchaser has an immediate and perfect right of action. And at that instant the statute of limitations will attach, and begin to operate against the right of action of the purchaser.

In the present case, the defendant having no title to the slave, the loss of possession by the seizure of the sheriff on the writ of replevin, was sufficient to entitle the plaintiff to maintain his action. The right to sue then accrued, and was perfect; and from that point of time, the statute commenced to operate. If a good title had been communicated to the plaintiff by the sale, of course a wrongful dispossession, by the act of a third person, would have furnished no ground of action against the defendant. As a period of more than six years elapsed, from the seizure of the slave by the sheriff, before the commencement of this suit, it follows that the plaintiff's action is barred.

In this view of the case, it does not become neces-

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sary to consider the objection taken to the *form* of the action. It may be observed, however, that the bringing of an action of *debt* was, to say the least of it, a very liberal application of the principle announced in the case of *Thompson v. French*, 10 Yer., 452.

But, as that point is not necessary to the determination of the case, and the action fails on the other ground, we express no authoritative opinion upon the question.

Judgment affirmed.

CHARLES READY v. JOSEPH BRAGG *et al.*

1. **FRAUDULENT CONVEYANCES.** *Husband and wife. Husband may be the agent of the wife.* It is competent for the husband, as the agent of his wife, to invest her money in the purchase of a tract of land. If the land is in fact purchased for the wife, and paid for with her money, in pursuance of an agreement between the husband and wife, founded upon a sufficient consideration, the transaction is not fraudulent as against the husband's creditors.
2. **PRINCIPAL AND AGENT.** *Property of principal not liable for agent's debts.* If one merely empowered as agent to purchase land for another, takes the title to himself, either intentionally or by mistake, he is not thereby vested with such a title as will subject the land to seizure and sale for the satisfaction of his debts. A Court of Equity will divest him of his title, and vest it in his principal, or direct the vendor, if a party, to execute a conveyance to the true owner of the land.
3. **SAME.** *Parol disclaimer by agent, and title made to principal.* If, without the intervention of a Court of Equity, the agent voluntarily disclaims and renounces all interest in the estate by parol declaration merely, and by the assent of all the parties, the deed made to the

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agent being unregistered, is destroyed, and a conveyance be thereupon executed to the real purchaser, the latter is clothed with a valid title to the land. Nor will the application of the principle be varied by the fact that the agent, or nominal purchaser, sustains a particular relation (as that of husband) to the person for whom the purchase was really made, and by whom the consideration money was, in fact, paid.

4. **SAME.** *Chancery jurisdiction. Superior equity.* If, by virtue of the unregistered deed to the agent, the land was subject to an execution at law against him, the equity of the principal, the wife, being superior to that of the creditors, a Court of Chancery would not actively interpose in favor of the husband's creditors to aid them in any way in obtaining satisfaction out of the land as against the equitable right of the wife, but would dismiss them to their legal remedy.

FROM CANNON.

This cause was heard at the October Term, 1858, before Chancellor RIDLEY, who pronounced a decree for the complainant. The defendants appealed.

J. L. FARE, for the complainant, cited and commented upon the following authorities: 6 Yer., 320; 2 Yer., 91; Peck, 24; 10 Yer., 1; 6 Hum., 295; 9 Hum., 146; 1 Swan, 202.

E. A. KEEBLE, for the complainant.]

EWING & COOPER, for the defendants.

McKINNEY, J., delivered the opinion of the Court.

The object of the bill is to subject a tract of land, alleged to be the property of the defendant, Joseph Bragg, to the satisfaction of a judgment for \$185.65,

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rendered against him by a justice, on the 29th of January, 1853, in favor of complainant, upon which execution was returned *nulla bona*.

It appears from the proof, that, perhaps, in the early part of the year 1852, the defendant, Joseph, purchased a tract of land of fifty acres from one S. F. Parker, at the price of \$100, and took a deed to *himself* for the same, and, at the same time, executed his note to Parker for the consideration money; which note was transferred to one Silas Parker; and it was paid, as the proof pretty clearly establishes, out of a fund belonging to the defendant, Elizabeth Bragg, wife of said Joseph Bragg.

The proof shows that Mrs. Bragg had a fund of \$400 in the office of the Circuit Court of Rutherford, being her distributive portion of her deceased father's estate.

On the 8th of March, 1852, she made a power of attorney authorizing her husband to receive said sum of money for her, and it was paid to him accordingly. And out of this money, the proof makes it reasonably certain said land was paid for. Indeed, from the evidence, the husband had not means of his own to have paid for it.

It is proved by Parker, the vendor, that when the defendant, Joseph, first proposed to purchase the land, he informed Parker that his wife's money was to pay for it, and that "she wanted the right in her own name." And, from all the circumstances, there can be no reasonable doubt of the fact that the purchase was made upon an agreement between the husband and wife that it should be for her benefit, and the title be taken

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in her name. The deed, however, which was prepared by a stranger, was drawn in the name of the defendant, Joseph, and was executed accordingly by Parker. But this deed not having been proved or registered, it was afterwards destroyed; and, on the 3d of December, 1852, with the assent of all the parties, another deed was executed by Parker, conveying said land directly to the defendant, Elizabeth Bragg; which deed was duly acknowledged, and noted for registration on the day after its date, and nearly two months prior to the date of complainant's judgment.

The position assumed by the complainant's counsel is, that by the execution of the first deed—the question of intentional fraud aside—the vendor was divested of his legal estate, and the title became vested in Joseph Bragg; and that, notwithstanding his title may have been incomplete for want of probate and registration, yet the land was subject to be levied upon and sold for his debts, and that the destruction of the deed did not divest the title of the defendant, Joseph, or reinvest the vendor with any interest in the land; and, consequently, it is insisted, the subsequent deed to Mrs. Bragg was inoperative, in law, to communicate any title to her.

In support of these views, *Vance v. McNairy*, 3 Yer., 171, and *Shields v. Mitchell*, 10 Yer., 1, are relied on.

It is likewise insisted that the conveyance to the wife was a meditated fraud upon the creditors of the husband.

Upon this point of the case all that need be said is, that if the land were in fact purchased for the wife,

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and paid for with her own money, in pursuance of an agreement between the husband and wife, founded upon a sufficient consideration, we do not perceive how the transaction can be considered fraudulent as against the husband's creditors. That such an agreement between husband and wife would be valid, and that the husband might be constituted agent of the wife to make the purchase, can admit of no doubt. *Powell v. Powell*, 9 Hum., 477.

We do not question the correctness of the decisions in *Vance v. McNairy* and *Shields v. Mitchell*. As between a debtor, holding land by an unregistered deed of conveyance, and his creditors, it is well settled that the land thus held is subject to levy and sale by execution at law. But does this principle govern the present case? If one empowered as agent, merely, to purchase land for another, takes a title to himself, either intentionally or by inadvertence, is he thereby vested with such a title as will subject the land to seizure and sale for the satisfaction of *his* debts? Would not a Court of Equity unhesitatingly divest him of the title, and vest it in the principal, or direct the vendor, if a party, to execute a conveyance to the true owner of the land? And if, without the intervention of a Court of Equity, the agent voluntarily disclaims and renounces all interest in the estate by parol declaration merely, and, by the assent of all the parties, the unregistered deed be destroyed, and a conveyance be thereupon executed to the real purchaser, upon what principle of law or equity can it be held that the latter is not clothed with a valid title to the land? Surely his right can not be prejudiced, nor his title destroyed

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by the mistake or fraud, either of the agent or person dealing with such agent. And the application of the principle will not be varied by the fact, that the agent or nominal purchaser sustains a particular relation, as that of husband, to the person for whom the purchase was really made, and by whom the consideration money was in fact paid. This consideration may properly demand an increased vigilance in sifting the *bona fides* of the transaction, but it cannot change the operation of established principles of law.

But, if it were to be admitted, as argued for the complainant, that by the mere fact of the execution of the *first* deed to the defendant, Joseph Bragg, he became thereby so invested with the legal estate as that his creditors might subject the land, upon an execution at law; still, upon well settled principles of equity jurisprudence, a Court of Chancery would not actively interpose in favor of the husband's creditors to aid them, in any way, in obtaining satisfaction out of the land, as against the equitable right of the wife, but would dismiss them to their legal remedy. And in this view, all other considerations aside, the complainant would be repelled.

The decree is, consequently, erroneous; and it will be reversed, and the bill be dismissed.

James Mullins *et al.* v. J. R. Jones.

JAMES MULLINS *et al.* v. J. R. JONES.

1. **CONSIDERATION.** *Failure of. Sale of land. Fraud.* If a note or bill single is executed to secure the payment of a part of the consideration money of a tract of land, and the vendor executes his title bond, obligating himself to make to the purchaser a deed in *fee simple*, when the purchase money is paid, and at the time of the sale the vendor had neither a legal or equitable title to the land, knew that fact, and concealed it from the vendee, there is a failure of the consideration of said note; and the concealment of the true condition of the title, is a fraud upon the vendee, and the payment of the note cannot be enforced.
2. **SAME.** *Assignment of the note Rights of the assignee.* The assignee of said note, with a full knowledge of the failure of the consideration and the fraud of the vendor, stands in the condition of the vendor, and the consideration thereof may be inquired into as well as the fraud, in his hands.

FROM BEDFORD.

At the August Term, 1858, verdict and judgment were rendered in favor of the plaintiff, DAVIDSON, J., presiding. The defendants appealed.

W. H. WISENER, for the plaintiffs in error.

BUCHANAN, KEEBLE and E. COOPER, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

This was an action of debt by John R. Jones, against the plaintiffs in error, in the Circuit Court of Bedford

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county, upon a *bill single*, for \$2314.52, dated the 25th of January, 1857, and due the 9th of January, 1858.

It was made payable to John C. Aiken, and by him endorsed to the plaintiff.

The declaration is in the usual form.

The defendants filed two pleas: the first, a plea of payment upon which issue was taken, and the same being found against them, judgment was rendered for the plaintiff, and they have appealed in error to this Court.

To the second plea, the plaintiff demurred, and the demurrer was sustained by the Circuit Court; and the question here is, can the judgment of the Circuit Court, upon this plea, be sustained? And we think it cannot.

The plea, in substance, averred that this bill single was executed to secure the payment of a part of the consideration money of a tract of land, sold by John C. Aiken and wife, and said Jones, to the defendant Mullins, and that they executed to him their bond for title, in which they become bound to make him a deed in *fee simple*, when the purchase money should be paid, but that at the time of the sale they had no title, legal or equitable, to said tract of land; nor have they acquired any since, the same being in one Gray, and in the heirs of one Sims; that they knew this at the time of the sale, and failed to communicate it to the defendants; and that the plaintiff, when the note was assigned to him, had full knowledge of these facts, and so defendants say the consideration of said bill single, has failed.

To maintain the judgment of the Court, we are referred

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to the cases of *Coleman v. Sanderlin*, 5 Hum., 562, and *Henning v. Vanhook*, 8 Hum., 678.

But the former of these cases turned upon the ground that a defence could *not be made at law*, the note having a seal to it. And the latter is the case of an *executed contract, a conveyance having been made*.

Now, by the act of 1850, ch. 60, the same defence may be made to a bill single, as to a promissory note. Here Jones is in no better condition than Aiken. It is well settled, that between the original parties to a note or bill, the consideration may be inquired into. So also where there has been fraud.

If this plea be true, and we are bound upon the demurrer so to take it, then this bill single is void for fraud; and the consideration for it has entirely failed, for the vendors have no title to the land, and knew it at the time of the sale, and concealed the fact from the plaintiffs in error, who, for aught that appears in this record, have never received anything for said bill single, not even so much as the possession of the land. Mullins, by the terms of the contract as stated in the plea, is entitled to an indefeasible title when he pays the purchase money. *Judson v. Wass*, 11 Johns. R., 525-528. But the vendors having no title, and therefore unable to complete the purchase, and the contract being void for fraud, the purchaser may treat the whole as a nullity and avoid the note. *Judson v. Wass*, 11 Johnson, 525; *Buchanan v. Alwell*, 8 Hum., 516; *Tillotson, Adm'r, v. Groves*, 4 N. Hamp. R., 445.

This plea, upon an investigation of its facts, may turn out to be untrue, but as it stands in this

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record, we are constrained to reverse the judgment, and remand the cause for another trial.

The demurrer will be overruled, and the plaintiff will be allowed to take issue upon the plea, or file a replication to it, as he shall deem proper.

Judgment reversed.

B. F. TURNER v. CARTER AND PULLIAM.

1. PLEADING. *Rule to plead and try.* A rule to plead and try has spent its force, and ceases to have effect, after the expiration of the term of the Court to which, by its terms, it applies.
2. SAME. *What the appearance term. Defence at.* The delay of the plaintiff to file his declaration has the effect of making the term at which it is filed the appearance term, so far as respects the defendant's right of making his defence. The defence can be made to the declaration, when filed, without leave of the Court.
3. SAME. *What judgment proper on demurrer. Exceptions to the rule.* In general, the proper judgment on sustaining a demurrer to a plea in abatement, or to a replication thereto, is, that the defendant answer over. The exceptions to this rule are few, and of a highly technical character. If a plea, containing matter which can only be pleaded in abatement, improperly commences or concludes in bar; or where matter in abatement is pleaded after the *last continuance*, the judgment on demurrer may be *final*.
4. SAME. *An interlocutory judgment is under the control of the Court.* Even if the judgment on a demurrer to a plea in abatement were final, still the Court possesses the power to control it, and to let the defendant in to make his defence; and it is a positive duty to do so, upon such terms as may be deemed just under the circumstances, if it is shown that the defendant has a meritorious defence.
5. WRIT OF INQUIRY. *Proof. Rule as to damages.* The effect of an interlocutory judgment by *default* is, simply, to establish the plaintiff's right to maintain his action and to recover *some* damages, but the amount, upon an inquisition of damages, remains open to be ascertained by proof; and upon this question both parties have an equal

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right to be heard. The defendant has the right to show that the plaintiff has no legal claim to damages; and if successful in thus showing, the plaintiff is entitled to nothing more than *nominal damages*.

FROM RUTHERFORD.

This cause was heard at the July Term, 1858, DAVIDSON, J., presiding. The defendant appealed.

JAMES M. AVENT, for the plaintiff in error.

J. B. PALMER and E. A. KEEBLE, for the defendants in error.

McKINNEY, J., delivered the opinion of the Court.

The plaintiff in error was sued by the defendants in an action of assumpsit. The suit was an appearance to the March Term, 1857, of the Circuit Court of Rutherford. It seems, from a statement in the bill of exceptions, that, for some reason not disclosed in the record, a rule was made "to plead and try" at the same term to which the process was returned, to wit, March Term, 1857. This was not done, however, and no declaration was filed until the November Term, 1857. At the same term, and on the same day on which the declaration was filed, as the bill of exceptions shows, the defendant filed an informal plea in abatement, alleging the pendency of another action between the same parties, involving the same matters set forth in the declaration as the ground of the present action. To this plea there was a demurrer, which was sustained. And

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thereupon the defendant moved the Court for leave to plead over to the merits, and accompanied his application with a strong affidavit, showing, if true, a meritorious defence to the action; and also presented his pleas with the affidavit, which, it is not controverted, were issuable pleas. But the application was refused by the Court, upon what ground is not stated. From the argument, we are left to infer that the refusal was in view of the supposed effect of the rule to "plead and try" at the previous March Term. If so, or whatever may have been the reason, the refusal was a manifest denial of the defendant's rights. The rule to plead and try at the March Term not having been enforced, but, on the contrary, having been waived by mutual consent, as we must suppose in the state of this record, it had spent its force; and after the expiration of the term to which it applied by its terms, was no longer of any validity or effect. It was certainly unjust to the defendant to visit upon him the consequences of a non-compliance with the rule, when, by the plaintiffs' own failure to file their declaration at that term, they rendered a compliance impossible, and even put it out of the power of the defendant to put in his defence to the action.

The delay of the plaintiffs to file a declaration until the November Term, had, of necessity, the effect of making *that* the appearance term, so far as respects the defendant's right of making his defence; and for the plain reason that, by their own delay, he could not put in his defence at an earlier period, there being no declaration on file to be answered.

It was a matter of right, therefore, on the part of the defendant, to plead to the declaration when filed. No

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leave of the Court was necessary, and, in annexing terms, the Court erred.

The so-called plea in abatement was defective, and the demurrer was properly sustained. But the refusal to permit the defendant to answer over, after judgment on the demurrer, was a double error.

In general, the proper judgment on demurrer to a plea in abatement, or to a replication thereto, is, that the defendant answer over. 1 Chitty's Pl., 500. (Ed. of 1837.) The exceptions to this rule are few, and of a highly technical nature. If a plea, containing matter which can only be pleaded in abatement, improperly commences or concludes in bar, it is said the judgment on demurrer *may* be final. And it seems the same rule prevails where matter in abatement is pleaded after the last continuance. *Id.* By the latter of these exceptions, the Court was probably influenced in denying the defendant's right to plead over. But this was an entire misapprehension of its true import. Upon the state of facts in this record there had been *no continuance*, in the sense of the exception. We have already seen, that, as regards the defendant's right to plead, the November Term was the appearance term.

In this view, alone, it was error to refuse the application of defendant to plead over. It was denying a privilege to which he was entitled as a matter of right. But even if, by law, the judgment on demurrer had been final, still the Court possessed the power to control the judgment, and to let the defendant in to make his defence; and it was a positive duty to do so, if it were shown that he had a meritorious defence, upon such terms as might be deemed just, under the circumstances. In this

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view the Court likewise erred in refusing the defendant's application, as the affidavit makes a *prima facie* case of merits, and more especially so, as the application was at the first term for making defence.

The judgment on the demurrer was interlocutory, the damages being unliquidated, and a writ of inquiry was awarded to ascertain the amount which the plaintiffs were entitled to recover. This came on to be executed at a subsequent term.

The jury were charged, "to ascertain the damages sustained by plaintiffs by the non-performance, by defendant, of his contract in the declaration mentioned;" and they estimated the amount to be \$1,452, for which final judgment was rendered. For the purpose of showing the amount of damages sustained, the plaintiffs went into proof of their whole case; and this was, perhaps, necessary and proper enough, other considerations aside. The defendant likewise had witnesses in attendance, by whom he offered to establish facts tending to prove that the plaintiffs had really sustained no damages whatever, and in justice were entitled to no recovery; but the Court refused to permit the defendant to offer any evidence.

Before proceeding to empanel the jury, the Court was moved to set aside the judgment and allow the defendant to plead, on grounds disclosed by affidavit, but the motion was refused.

In the aspect in which this case is presented we do not think it proper to enter into a discussion of the question, whether, upon the assumption that the facts offered to be proved by the defendant are true, the plaintiffs have any just ground of recovery. That

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inquiry must be postponed until the defendant shall have had the opportunity of presenting his proof in such a form as that its proper force and effect can be legitimately considered of and determined.

All that we propose at present, as to this part of the case, is to determine whether the defendant, on the inquisition of damages, had a right to be heard, or to offer evidence for any purpose. And we hold it to be clear that he had, to a limited extent.

The legal effect of the interlocutory judgment, which, for the present purpose, may be supposed to have been properly entered, was simply to establish the plaintiffs naked right to maintain their action, and, consequently, to recover *some* damages, though they might be merely nominal. But the quantum of damages remained an open one, to be ascertained by proof; and upon this question both parties had an equal right to be heard. The defendant was no further compromised by the judgment by default, than to preclude him from denying the plaintiffs' right to *nominal* damages. But, subject to this qualification, he had the right to show, if in his power, that the plaintiffs had no legal claim to damages; and, if successful in the attempt, the plaintiffs would have been entitled to nothing more than merely nominal damages.

In simple justice to the defendant, whose rights have been so entirely *ignored* in these proceedings, we feel constrained to reverse and set aside both the interlocutory and final judgments, and to remand the cause, with liberty to the defendant to plead to the merits of the action, in such manner as may be thought necessary for his defence. Judgment reversed.

Thos. J. Roane *et al.* v. The Bank of Nashville *et al.*

THOS. J. ROANE *et al.* v. THE BANK OF NASHVILLE *et al.*

1. **FRAUDULENT CONVEYANCES.** *Usury.* At the date of the execution of the deed of trust attacked, the Bank of Nashville had a judgment against Smith, Doak, Cummings and Blakemore, for \$13,000. Blakemore and Cummings were endorsers, and had filed a bill to be relieved from liability, on grounds assumed by them. The Bank had also filed a bill against Hays, on account of his transactions with Smith in relation to his land, in which it was claimed that he was liable for about \$8,000. Smith and Doak were insolvent, but Cummings and Smith were good. In this state of things, Hays, then having a large property, though much involved, entered into an agreement with the Bank, and with Cummings, Blakemore and Cooper, that if the Bank would loan him \$15,000 on long time, and the other parties \$6,250, he would assume the debt of \$13,000, and secure the whole by a deed of trust upon his land and slaves. This agreement was executed. It is held, that the contract was not *usurious* as to the \$13,000, nor was the conveyance fraudulent and void as to the creditors of Hays.
2. **SAME.** *Excess of property. Extension of time.* If judgments are hanging over the maker of a deed of trust, and the debts secured are for a large amount, it is not improper to make the security ample. Nor will the fact that a larger amount of property than is necessary to pay the secured debts, is included in the conveyance, render it void. Neither will the extension of the time of payment to five years make it fraudulent as to creditors.

FROM BEDFORD.

This cause was heard at the August Term, 1858, before Chancellor RIDLEY, who dismissed the bills. The complainants appealed.

W. H. WISENER, STEELE and E. A. KEEBLE, for the complainants, cited 11 Hum., 327; 2 Story's Eq.,

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715; 1 Yer., 71, 297; 2 Yer., 195; 3 Yer., 509; 4 Sneed, 71.

HOUSTON & BROWN, E. COOPER and W. F. COOPER,
for the defendants, argued:

1. There is not the first feature of usury in all this negotiation. No intention to exact usury in any shape, or under any cover or pretence whatever. The idea of usury never entered the minds of the parties. There was no illegal agreement to take more than six per cent. for the loan of money, or for the forbearance of debt. *Turney v. State Bank*; 5 Hum., 407.

2. There is as little ground for the position that the assumption of the \$13,000 by Hays, was voluntary and void as to his creditors. The transaction shows a complete settlement of the whole debt due the Bank. It had judgments against Smith, Doak, Cummings and Blakemore, for the debt, and also a bill pending against Hays, claiming to be entitled to recover the whole sum from him, and by the compromise, these matters were settled. This was ample consideration for the assumption of the \$13,000 by Hays. It was the sole intention of the parties to settle and end the controversy, without the least thought of taking any advantage of any creditor of Hays. There is no ground for the suspicion of any intentional fraud.

3. There was nothing improper in the fact that the property greatly exceeded in value, the debts secured in the trust, or that the time given to close the deed was, in law, fraudulent. The transaction was, in substance, the creation of a new debt, upon the making or exe-

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cuting a mortgage or deed of trust to secure its payment, and neither the time given, nor the excess of value of the property, vitiated it. *Bennett v. Union Bank*, 5 Hum., 612.

4. But both deeds of trust were closed, the whole matter settled, and the debts paid off by a distribution of the proceeds of the sale of the trust property, before complainants filed these bills, and before they recovered their judgments against Hays, and of course then, the only question would be, whether any of the debts then paid off by the trustee out of the trust property, were not the proper debts of Hays, which brings us back to the validity of the assumption of the payment of the \$18,000 by Hays, which has already been considered.

Even if there were anything in the length of time, or the excess of the value of the property, it is too late now to be available to complainants. This is clearly settled in the case of *Peacock v. Tompkins*, Meigs' R., 317.

CARUTHERS, J., delivered the opinion of the Court.

Six bills were filed by the creditors of Samuel G. Hays, against the Bank of Nashville and others, to impeach and set aside for fraud, two deeds of trust made by said Hays, covering all his property of the value of about \$60,000 as alleged, to Edmund Cooper, as trustee to secure the debts specified in said deeds. These bills were consolidated and heard together, when they

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were all dismissed by the Chancellor, and the deeds of trust held to be good and valid.

The first deed was made on the 8th of August, 1856, and is the one on which the main assault is made. The grounds of attack are:

1. That the debt which it was made to secure, to the Bank of Nashville, was largely tainted with usury. It amounted to about \$28,000, and that, together with a debt of \$5,000 to Cooper and Cummings, and \$1250 to Blakemore, were the debts secured by that deed upon land and slaves, worth largely more than the aggregate amount. But the imputation against the Bank debt is what we have to examine. At the date of this deed, the Bank had a judgment against Smith, Doak, Cummings and Blakemore, for about \$18,000. Blakemore and Cummings were endorsers, and had filed a bill to be relieved from liability on some ground assumed by them as endorsers, perhaps on account of time given to the principals. The Bank had also filed a bill against *Hays*, on account of his transactions with Smith in relation to his land, in which it was claimed that he was liable for about \$8,000. Smith and Doak were insolvent, but Cummings and Smith not so considered. In this state of things, Hays, then having a large property, though much involved, entered into an agreement with the Bank, and with Cummings, Blakemore and Cooper, that if the Bank would loan him \$15,000 on long time, and the others \$6250, he would assume the said debt of \$18,000, and secure the whole by a trust upon his land and slaves. This was agreed to, the money advanced, the judgment transferred, and the deed of trust executed. This, it is insisted, was usurious, to the ex-

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tent of the \$13,000, because Hays was not bound for that, and as it was worthless, it could only be regarded as interest given for the loan of \$15,000 or \$21,000 advanced to him. If it were true that the judgment was worthless, and Hays in no way bound for it, the question insisted upon would arise and be difficult to meet. But such is not the case. Hays was alleged to be liable for \$8,000 of it, and the endorsers were not insolvent, and perhaps would have been unable to resist their liability, as might be inferred, from the fact that they entered into the arrangement by which they had to raise a large amount of money to accomplish the adjustment by which Hays become bound for the debt to the Bank. There can be no serious doubt but that this was a fair, reasonable and *bona fide* transaction on all sides. The Bank was willing to enlarge its debt from \$13,000 to \$20,000, and extend the time to five years, upon the regular payment of interest, in order to get clear of further litigation; and Hays was willing to take the assignment of the judgment, for two-thirds of which he was attempted to be made liable, and perhaps expected to secure it all from the principals and endorsers, before the time given him would elapse; and in the meantime get the \$21,000 in cash, to aid him in the struggle to save his property against the large amount of judgments then obtained against him, to which it seems, from after developments, the most, if not all this money was applied, and proved insufficient to relieve it. He doubtless flattered himself, as most sinking men do, that by obtaining time and sufficient present help, he would certainly be able to extricate himself from the ruin with which he was threatened by impending diffi-

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culties. This was doubtless his calculation, and was the operating inducement to make the proposition to which the Bank and the others, acceded, and which resulted in the arrangement in question. No extra interest was demanded, or given. Under these circumstances, the assignment of the \$13,000 judgment cannot be regarded as an attempt to evade the usury laws; but a purchase and assignment, in a fair and legal transaction, upon motives and considerations satisfactory to both sides, and to which there can be no legal objections. It was not a case of fictitious debts, nor of worthless paper, as argued by complainants' counsel.

2. The next ground of objection is, that the amount of property was unreasonably disproportionate to the debt secured, and the time of credit was so great, as to raise a presumption of fraud. It is true, that the land and slaves were worth greatly more than the debts, large as they were, but this was not unreasonable, as the property was bound by judgments and executions to a vast amount, and in the involved condition of Hays, it was not improper to make the security thus ample. And as it turned out, it was proved not to be excessive. There was no illegality either, in the extension of the credit to five years, as that could not affect other creditors injuriously, unless property to a greater amount than was necessary to pay the secured debts, was thereby covered up and shielded from them, by which they were defeated or delayed in the collection of their debts, or some personal advantage was thereby intended to be secured to the common debtor, to the injury of other creditors. The land was sold in about one month

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afterwards, on the same time, to Thompson, and the proceeds, or his notes for the price, used in the discharge of the debts, secured. It is true that an excess remained after the payment of the secured debts. But before the complainants obtained judgments upon their claims, and secured to themselves any lien upon, or preference to the excess, by attachment or otherwise, the second deed of trust of 29th of November, 1856, was executed to secure other debts, to which, it is conceded, the whole balance of the proceeds of the land, as well as the slaves, and other things included in it, were appropriated, and will not be more than sufficient to discharge the preferred debts therein specified. If the object and effect of extending the time was to increase the fund, no one can complain, for it was to the advantage of all.

If a debtor has the right and power to appropriate his property to some creditors in preference to others, when he cannot pay all, of which, of course there can be no doubt, there is nothing in this transaction against law or morals. It is but the common case where some creditors are more fortunate, or more vigilant than others; the latter must loose where all cannot be saved.

It is admitted, that there will be no overplus after the payment of the debts secured in the two deeds of trust, both of which were made before the filing of these bills, and the complainants declined to go into an account to ascertain the fact, conceding that all the trust fund arising from the proceeds of the land, slaves and choses in action, conveyed in the deeds, would not be more than enough for that purpose. Consequently, as

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we find the trust deeds were neither fraudulent in law or in fact, the bills were correctly dismissed.

We, therefore, affirm the decree, with costs.

R. M. WHITSON v. G. W. FOWLKES.

1. **CONTRACT. Warranty. Execution sale.** If a slave is sold at an execution sale, and bid off by a party, and immediately after the property is struck off, and before the slave is delivered, by agreement with another competing bidder, the latter is substituted as the purchaser and the bill of sale made to him, the *substitute* takes his place, not as a purchaser from him, but as the successful bidder at the sale, and takes upon himself all the risks which devolve upon purchasers at execution sales. There is no warranty by the first purchaser, either express or implied. The maxim, *caveat emptor*, applies.
2. **SAME. Consideration.** If the person thus substituted as the purchaser, in place of the party to whom the slave is struck off, is sued; and upon application to him, the latter agrees to pay a part of the expenses of said suit, such promise is without consideration, and void.

FROM HICKMAN.

This cause was tried before WALKER, J., at the October Term, 1858. The defendant appealed.

BATEMAN, for the plaintiff in error.

CAMPBELL & HUBBARD, for the defendant in error.

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CARUTHERS, J., delivered the opinion of the Court.

At a sale of a negro boy named John, under an execution against Felix G. Studdort; he was struck off to Whitson as the highest bidder, and at the request of Fowlkes, who was present, and a competing bidder, and in a few minutes after the property was struck off, and before the slave was delivered, he was substituted as the purchaser, and the bill of sale made to him. After this, suits were brought by John Studdort, for this and another slave sold at the same time, and bought by Horatio Clogatt, under a claim of title, in the Federal Court, at Nashville. During the pendency of these suits Fowlkes had a conversation with Whitson in which he stated to him, that such suits had been brought, and that he and Clogatt expected to join in the defence of them, and "thus lighten the expense" to each, "and asked Whitson if he would bear his part of the suit against him, Fowlkes, to which he replied, *"certainly, or, I reckon so."* It appears, that after the suit against Clogatt was tried, and gained by the latter, the suit against Fowlkes was dismissed. The lawyers' fees and tavern expenses were paid by Fowlkes, and in this suit for one-half of the same, he recovered fifty dollars against Whitson upon the above promise. This appeal in error is to reverse that judgment.

The Court instructed the jury, that if they found the promise, the consideration would be sufficient; because, in such a case, upon the facts stated, the transaction would be a sale of the slave by Whitson to Fowlkes, and the law would imply a warranty of title, and his liability for that would constitute a good con-

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sideration for a promise to assist in its defence. We cannot concur in this view of his honor, or rather, in his premises. We think the facts proved, do not amount to a sale from Whitson to Fowlkes. It was nothing more than an agreement while the matter was in progress, and not consummated, that the latter should take the place of the former, as purchaser at the sale, and by paying the bid, obtain its benefit by having the title made to himself. The transaction had no other effect than to substitute Fowlkes to the place of Whitson, and so soon as the terms of the sale were complied with by the former, the latter stood as if he had never made the bid. He was bound to the officer, and as to him, could only be discharged by the payment of the bid, but that having been done, was a complete exoneration of Whitson. The circumstances imposed no obligation upon Whitson as to the title. His *substitute* stepped into his shoes, not as purchaser from him, but as the successful bidder at the sale, and consequently, took upon himself all the risks, which, by law, devolves upon the purchaser at execution sales. There is no warranty, express or implied; *caveat emptor* is the maxim.

The conversation was very vague and indefinite; it is difficult to make a contract or binding promise out of it; but if it be so construed, upon our view of the transaction, it would be void for want of a consideration.

The judgment will be reversed.

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OLIVER AND GILLIAM v. LEWIS B. MARKES.

1. **COVENANT.** *Consideration. Bond given to indemnify endorser.* An accommodation endorser proposed to confess a judgment, at the appearance term, for the purpose of taking a judgment, by motion, against his principal, who was then solvent. He declined doing so, upon the execution of a bond to indemnify him, as such endorser, in the event he was forced to pay any thing in consequence of said suit. It is held, that this was a sufficient consideration to sustain said bond, and the endorser could sue thereon, if forced to pay any part of the debt in suit.
2. **SAME.** *Need not exhaust his remedy against others.* The parties are bound by the conditions of the bond. And if there is no stipulation that the obligee in the bond is to exhaust his remedies against his principal, or a prior endorser, he is not bound to do so. It is sufficient to maintain the action, that the principal has no property out of which the debt can be made, and that the obligee has been compelled to pay the same.

FROM GILES.

This cause was heard at the December Term, 1858, MARTIN, J., presiding. Verdict and judgment for the plaintiff. The defendants appealed.

H. WARD & LESTER, for the plaintiff in error.

T. M. JONES, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

This was an action of covenant by Markes against Oliver and Gilliam, in which there was a recovery below for \$1,028 upon this bond: "State of Tennessee. We,

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A. Oliver and Samuel Gilliam, are held and firmly bound unto L. B. Markes in the sum of \$1,000, upon the condition, that, whereas the said Markes is the endorser upon a note drawn by Ira E. Brown for \$1,000, and endorsed to the Planters' Bank, upon which suit is now pending in the Circuit Court of Giles county in favor of said bank, against said Brown and Markes. Now, in consideration that the said Markes shall not confess judgment at the present term of said Court, so as to take judgment over against said Brown, we, the said Oliver and Gilliam, hereby agree to fully indemnify and hold the said Markes harmless as such endorser, and well and truly pay to him all sums of money which he may have to pay in consequence of said suit. * * * *
December 19, 1857." Signed under seal.

It is admitted in the case that one Trigg was the first, and Markes the second, *accommodation* endorsers upon the note then in suit. Markes complied with his agreement, and judgment was afterwards obtained against him, and he was coerced to pay the sum of \$1,064 by execution, on the 12th of July, 1858. Whereupon he instituted this action upon the bond. The sum of \$128 was remitted, and the judgment reduced to \$1,000, the penalty of the bond.

The defences are :

1. That there is no consideration. The question of a seal implying a consideration aside, it was proved that Markes was *accommodation* endorser for Brown. That he proposed to confess judgment at the appearance term, December, 1857, for the purpose of taking judgment against Brown, his principal, by motion, who was then entirely good and solvent, but refrained from doing

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so in consequence of this bond of indemnity; and before the next term, at which judgment was taken, Brown had removed his personal property from the State, and that his land was taken by a decree in the intermediate time, so that this debt could not be made out of his property, but fell upon the plaintiff, and was paid by him. The Court charged that this was a sufficient consideration for the undertaking of defendants. Of this there can certainly be no doubt. It needs no argument.

2. The Court being requested, refused to charge, that before the plaintiff could sue upon this covenant, he was bound to show that he had pursued and exhausted his remedies against Brown, and the estate of Trigg, the first endorser. There was proof that Trigg's estate was probably solvent, and that he was first endorser upon the note sued upon by the bank. But the Court instructed the jury that it was sufficient to maintain this action, that Brown had no property out of which the money could be made, and that the plaintiff had been compelled to pay it.

This was correct. The bond contained no such conditions. The undertaking of defendants with Markes, was that, in consideration that he would not adopt the summary course the law allowed him, to make himself safe by subjecting the property of Brown, which was then ample, to the payment of the debt, he should be fully "indemnified" and saved "harmless," "as endorser;" and these parties obligate themselves "to pay to him all sums of money which he may have to pay in consequence of said suit." Such is their bond, and no additional terms, by implication, can be inserted.

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He is not bound to encounter the delay, expense, and risk of pursuing other remedies that may possibly be open to him. They have afforded him an ample one without any precedent conditions, other than the compulsive payment of the money in that suit, and he has a perfect right to adopt it, in preference to any other that may be indicated, and to which he might resort, if this were to fail, or did not exist. He has sustained a loss as it is, in consequence of their interference, to the extent of the excess over the penalty of the bond and costs, as he could have secured himself entirely by the course he was prevented from adopting, by the execution of this bond.

Let the judgment be affirmed.

ELIJAH A. KIMBROUGH v. JOHN MITCHELL.

1. **ABATEMENT OF SUIT.** *By death. Motion to revive.* An appeal in the nature of a writ of error merely suspends the judgment of the inferior Court, and does not annul it. If, therefore, the plaintiff in an action for an assault and battery, dies, after an appeal in error by the defendant, it is not only the right, but likewise the duty of the personal representative to revive the suit in the Superior Court.
2. **EVIDENCE.** *Husband and wife. Competency of the wife after a divorce.* The wife is an incompetent witness to testify, in a suit to which the husband is a party, touching any matter that transpired during the existence of the marriage union, although she is divorced from him at the time she is called as a witness.

FROM GILES.

This cause was tried at the December Term, 1857, MARTIN, J., presiding. The defendant appealed in error.

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After the appeal, the plaintiff died, and his personal representative entered a motion in the Supreme Court to revive the suit in his name. This motion was resisted by the counsel for the defendant.

THOMAS M. JONES, for the plaintiff in error.

J. C. WALKER, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action of trespass brought by Mitchell against the plaintiff in error, for a violent assault and battery committed by the latter upon the person of the former.

The case was tried at the December Term, 1857, of the Circuit Court of Giles, and verdict and judgment were rendered for the plaintiff for \$437.50. From which judgment an appeal in error was prosecuted to this Court by the defendant, Kimbrough.

Since the transfer of the suit to this Court by the appeal in error, Mitchell, the defendant in error, died; and his death having been suggested and admitted upon the record of this Court, a motion is made, in behalf of his personal representative, to have the appeal in error revived in the name of the latter. The motion is opposed, upon the common law maxim, that *actio personalis moritur cum persona*. This principle, we think, is not applicable to the case. By the recovery in the lifetime of the injured party, the claim for damages was merged in the judgment, and became a debt with which the personal representative was chargeable.

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The demand being thus impressed with the character of a debt, it is clear that it is not only the right, but likewise the duty of the personal representative to insist upon a revivor.

The position is altogether mistaken, that the judgment is annulled by the removal of the case to this Court, and proceeds from losing sight of the distinction between a simple appeal and an appeal in the nature of a writ of error. The latter merely suspends the judgment of the inferior Court, and does not annul it; and, consequently, if the appeal in error be abated or dismissed, the judgment below is left unimpaired and in full force. *Furber v. Carter*, 2 Sneed, 1. The motion to revive is therefore allowed. It may be remarked that the common law maxim, that "a personal right of action dies with the person" is no longer applicable in this State. By § 2846 of the Code, all actions founded on wrongs, except wrongs affecting the *character* of the plaintiff, may be revived.

Upon the merits of the case a single question is presented, in regard to the competency of a witness offered by the defendant.

It seems that the difficulty arose out of Mitchell's ill-treatment of his wife, who was the sister of Kimbrough. And the marriage having been dissolved by a divorce granted to Mitchell, after the assault and battery complained of, and before the trial of the present case; the defendant offered the former wife of the plaintiff to prove "how the difficulty occurred between the plaintiff and defendant," and the ill-usage of the husband which led to it. The Court held the witness to be incompetent to testify as to these matters, not-

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withstanding the dissolution of the marriage relation; and this is assigned as error.

We concur in the opinion that the witness was incompetent. It is true there is some discrepancy in the cases upon this subject. But no decision has been produced showing that the present case forms an exception to the general rule so well established, and of so much importance on grounds of public policy. The former husband is a party to the suit. His interest is directly involved. And the main objects proposed, in the examination of the former wife, are to show the abuse inflicted upon her by her husband, during the existence of the marriage union; and to justify, or, at least, to palliate the battery committed upon him by the defendant, in consequence of the alleged wrongs done to her.

If this were allowable, there would be no stopping place; and in all cases, whether affecting the property, reputation, or even life of her former husband, she might be made a witness. The question is too plain to require either argument or authority.

Judgment affirmed.

WILLIAM GRAY v. JAMES H. JONES *et al.*

1. REPLEVIN. *Jurisdiction. Justice of the Peace. Appeal.* A justice of the peace has no jurisdiction in an action of replevin, to render a judgment in favor of the plaintiff for more than fifty dollars; and he cannot render a judgment for a larger amount in favor of the defend-

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- ant. On appeal, the jurisdiction of the Circuit Court is limited to the jurisdiction of the justice, and no judgment can be rendered by the former tribunal that could not be rendered by the latter.
2. *SAME. Same. Value of the property.* In an action of replevin, the plaintiff may fix an estimate of value upon the property, at a less sum than the real value, and within the jurisdiction of a justice of the peace. But he is bound by this valuation voluntarily made, and if the property is not restored to his possession by the writ, he cannot recover, on the trial, a greater amount than the value thus fixed, and laid in the warrant.
3. *QUESTION RESERVED.* Whether, when an inadequate estimate has been placed, by the plaintiff, upon the property, and the verdict is for the defendant, and the value of the property fixed by it at a sum beyond the jurisdiction of the justice, judgment can be rendered for the amount of the verdict.

FROM LAWRENCE.

This cause was tried at the October Term, 1858, before his honor, Judge WALKER, who rendered judgment upon the verdict of the jury, in favor of the defendant. The plaintiff appealed.

R. H. ROSE, for the plaintiff.

JONES, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an action of replevin, for the recovery of a mule, commenced by Gray against Jones, before a justice, and taken by appeal to the Circuit Court. Judgment was for the defendant, and an appeal in error to this Court by the plaintiff.

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There is no bill of exceptions, and all that we know of the facts, is from the statement contained in a special verdict found by the jury, which is as follows:

"We find the mule in controversy, was won from the plaintiff on a horse race in the State of Alabama, by J. H. Boren, and sold to the defendant, James W. Jones; and that the mule was worth \$110.00, and that the suit was brought within ninety days. If, in the opinion of the Court, the justice who tried the case had jurisdiction, then we find for the plaintiff, and assess his damages to one cent. But if, in the opinion of the Court, the justice had no jurisdiction, then we find for the defendant, and assess the value of the mule at \$110.00, and assess his damages to ten dollars."

Upon this verdict, the Court rendered judgment for the defendant, in the alternative, that, on failure of the plaintiff to return the mule, the defendant recover the sum of \$110.00, the estimated value, and also the damages assessed for the detention.

The ground of this judgment, it is said in the argument, was, the want of jurisdiction in the justice.

We think the judgment is erroneous. If the justice had no jurisdiction to have rendered a judgment in favor of the plaintiff for more than fifty dollars, and, clearly, he had not, then it is obvious, that judgment for a larger amount could not have been rendered in favor of the defendant. And the jurisdiction of the Circuit Court, on the appeal, being limited to the jurisdiction of the justice, no judgment could be rendered by the former tribunal, that might not have been rendered by the latter. In this view, it was error to render judgment for the value of the mule, above fifty dollars.

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But it is said this was not admissible, inasmuch as the value had been fixed by the jury at a larger amount, and the Court had no power to change it. The case is a novel one, in this respect. The apparent difficulty in which the case is involved, results from the erroneous assumption that the case was not within the justice's jurisdiction.

The jurisdiction of the justice, it is true, was limited to fifty dollars. But then it was allowable for the plaintiff to fix an estimate of value upon the mule, at a less sum than the real value, and within the jurisdiction of the justice; and he, in fact, did do so, the value being laid in the warrant as not exceeding fifty dollars. And by this valuation, voluntarily made, for the purpose of the suit, the plaintiff would have been bound. If the mule had not been restored to his possession by the writ, he could not have recovered, on the trial, a greater amount than fifty dollars. Nor could he, in any other subsequent suit, have recovered the difference between that amount and the real value of the mule; the judgment would have concluded him.

This being so, the plaintiff was clearly entitled to a recovery, no question being made as to his rights, upon the merits of the case. The jury should have been instructed, that so far as the plaintiff was concerned, and for the purpose of the determination of the particular suit, they could not go beyond the value of the property, as fixed by the plaintiff.

The question would be one of more difficulty, if upon the merits, the verdict had been in favor of the defendant. It would certainly be unjust to preclude the defendant from recovering the fair value of the property,

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by reason of the inadequate estimate placed upon it by the plaintiff. What the result would be in such a case; whether, that no judgment whatever could be given for the value of the property, or for the full value, or only for the value fixed in the warrant, is an inquiry that we will leave open until the question shall be properly presented for determination.

The judgment will be reversed, and judgment upon the verdict will be rendered here in favor of the plaintiff.

CHARLES J. NEAL v. BRYANT H. PEDEN.

1. EVIDENCE. *Declarations of the vendor.* The right of a party to property *bona fide* purchased by him, cannot be prejudiced by statements made by the vendor, not in his presence, as to the transaction; but if the sale and purchase be unlawful and colorable, to hinder and delay the creditors of the vendor, the declarations of both are evidence against each of them.
2. SAME. *Statements of the vendor while in possession. Res gesta.* If a party make an absolute sale, and retain possession of the property inconsistently with the terms of the sale, his declarations in reference to the ownership, or contract, or terms upon which he holds possession of the property, are admissible as a part of the *res gesta*.
3. NEW TRIAL. *Illegal evidence admitted.* If incompetent evidence is admitted, and the opposite party proves the same fact by his witness,

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it being admitted, does not furnish sufficient ground for a reversal, and the granting of a new trial, since it could have done the party no harm.

FROM GILES.

This cause was heard at the December Term, 1857, before Judge MARTIN. There was verdict and judgment for the defendant. The plaintiff appealed.

H. WARD, for the plaintiff.

J. C. WALKER, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

This is an action of replevin for a buggy.

The plaintiff claims it as a purchaser from Ananias Pitts. The defendant is a constable, and seized it by virtue of an execution in favor of B. W. Mason, a creditor of Pitts, upon the ground that the alleged purchase, by the plaintiff, was colorable and intended to hinder and delay creditors.

The only question that need be considered here, is as to the admissibility of certain statements of Pitts, in regard to the ownership of this buggy; and what his purpose was in regard to it, as proved by James W. Mitchell, Laban A. Westmoreland and James M. Marks. These statements were objected to by the plaintiff as incompetent, because made in his absence, but were permitted to go to the jury as evidence.

In this, we think there is no error.

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It is certainly true that the right of a party to property *bona fide* purchased by him, cannot be prejudiced by the sayings of the vendor after the transaction, not in the presence of the purchaser.

But upon reading this record, it is difficult to resist the conclusion, that this purchase of the plaintiff was an unlawful and colorable device between him and Pitts, to hinder and delay the creditors of the former; and that the buggy really, all the while, belonged to him. If so, this evidence was admissible upon well settled principles. 1 Greenl. Ev., sec. 111.

But, however this may be, it is well settled, that if a party make an absolute sale, and retain the possession of the property, inconsistently with the terms of the sale, his statements in reference to the ownership, or contract, or terms upon which he holds possession of the property, may be received as a part of the *res gestæ*.

In such a case, it has been held, that the possession of the property is a badge of fraud, which, of itself, connects him with the claimant, in the suspicion of a confederacy to defeat creditors. *Trotter v. Watson*, 6 Hum., 509.

This principle applied to the present case, is decisive of it; since it is plain to our mind, upon a careful reading of this record, that all of the statements of Pitts, as detailed by the witnesses, save one, and that one furnishes no reversible error, were made after he had pretended to have sold the buggy to the plaintiff, and while he yet had the possession of it.

It is clear, the buggy was in an unfinished state, and at Lord's shop when the plaintiff affected to purchase

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it. It is equally plain, that it was not delivered to the plaintiff at the shop, but at Arrowsmith's livery stable, and that this was on the day of the defendant's levy, or the day before; for Marks proves it was then at the shop, and Pitts wished to borrow \$30.00 to get it away; and it was then he made to the witness, the statement supposed to be inadmissible; for certainly what he said on his way to Nashville, with the buggy in possession, was properly admitted. Mitchell is allowed to prove, that after he had taken the buggy to Nashville and sold it, he heard Pitts say, he had sold it to Porter for \$800.00. As before remarked, this, if error at all, is not cause for a reversal, because the same fact is proved by Pitts, the plaintiff's witness, and its repetition with defendant's evidence could have done no harm.

The other statements of Pitts, as proved by Mitchell and Westmoreland, were evidently made after the buggy had been finished, and while at the shop and in the possession and under the control of Pitts, and before its delivery to the plaintiff, and so admissible in evidence.

We find no error in the judgment, and affirm it.

SARAH PITTS v. SAMUEL GILLIAM.

1. CONTINUANCE. *In the discretion of the Court.* Continuances are in the discretion of the Court below, and the action of the inferior Courts in granting or refusing continuances, will not be reversed unless it *clearly* appear that there has been a *very great abuse* of this discretion.

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2. **ESTOPPEL.** *Acceptance of the provisions of a deed.* A party is estopped from ever denying his liability upon a note, after the execution of a deed of trust to secure said note, and the acceptance of its provisions. Thus, if the name of a person is forged to a note, and the maker of the note execute a deed of trust to secure the payment of the same, and in a controversy as to the validity of said deed, such person file an answer insisting that the deed was *bona fide* executed, and claiming the indemnity given thereby, he is ever after estopped from denying his liability upon the note, and could not rely upon the plea of *non est factum*.

FROM GILES.

This cause was heard at the December Term, 1857, MARTIN J., presiding. There was judgment for the plaintiff. The defendant appealed.

THOMAS M. JONES, for the plaintiff in error, cited and commented upon the act of 1819, ch. 27, § 4; *Carter v. Vaulx*, 2 Swan, 641; *Goodman v. The State*, Meigs' R., 194; *Turbeville v. Ryan*, 1 Hum., 112; *Boyd v. Dodson*, 5 Hum., 87.

J. C. WALKER and H. WARD, for the defendants.

Did the Court err in not continuing the case at the December Term, 1857, upon the statements of Watson and Geo. W. Pitts? It is insisted that it did not.

Continuances of causes rest in the sound discretion of the Judge trying the cause. And if the authority of the Court of Errors were often interposed to prescribe or reform the rules of the Circuit Court practice, the interest of the public would not, it is believed, be generally

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promoted thereby. *Rhea v. The State*, 10 Yer., 259; *Wyatt v. Richmond*, 4 Hum., 365; *Jarnagin v. Atkinson*, 4 Hum. 470; *Bellew v. The State*, 5 Hum., 567.

The Circuit Judges have a full view of all the circumstances which ought to influence them in disposing of motions for continuances; but it is difficult to communicate those circumstances for the inspection of the Court above. This Court will not reverse what the Circuit Court does in relation to a continuance, unless it clearly appears that the Court below erred. *Cornwell v. State*, Mar. & Yer., 147-151.

But if the plea of *non est factum* had been put in by the defendant, could it have availed her any thing? It certainly could not. If her name had been signed to the note without her authority, she had ratified it by accepting the deed of trust made by Ananias Pitts, the principal in the note, in which deed of trust the note to Wilson was described, and the defendant named as one of the securities on said note. And the defendant in her answer, filed in the Chancery Court, and sworn to, set up her claim to a benefit under said deed of trust, and alleges in her answer, that said deed of trust was made honestly and fairly, and to secure the just and *bona fide* creditors of the said Ananias Pitts. This is most assuredly a ratification of the note by the defendant, and that she was bound on the same as co-security with the plaintiff. *Jones v. Hamlet*, 2 Sneed, 256; *Fitzpatrick v. School Com'rs*, 7 Hum., 224.

If the note was not under seal, a parol ratification would be sufficient; but in this case there was a *written ratification*, by accepting the deed of trust, and filing

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and swearing to her answer in Chancery; and this is sufficient, if the note was under seal. *Cady v. Shepherd*, 11 Pickering, 403-407; *Mackay v. Bloodgood*, 9 Johnson, 285; 19 Johnson, 554.

A. M. Wilson describes the note, and shows that it is the same note mentioned in the deed of trust. He had but the one note against the said Ananias Pitts as principal, and the plaintiff and defendant as his securities, and parol evidence is competent to show that the note mentioned in the deed of trust is the same note upon which the plaintiff and defendant were bound as securities, &c. 7 Hum. R., 225, 226.

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CARUTHERS, J., delivered the opinion of the Court.

At the April Term, 1857, of the Circuit Court of Giles, Gilliam moved for judgment against Sarah Pitts for \$737.50, being the one-half of a judgment and costs for which plaintiff and defendant were liable, as is alleged, as the joint sureties of one Ananias Pitts, on a note to A. M. Wilson, administrator of Hiram Young, deceased, for \$1,846, due the 12th of December, 1855.

It appeared that the judgment had been obtained against the principal, Ananias, and Gilliam—the said Sarah not having been sued—and that, in consequence of the insolvency of Ananias, the same had been paid by Gilliam to the sheriff of Giles, on the 25th of April, 1857, when it amounted to \$1,458.63. The note is in these words:

“Twelve months after date, we, or either of us,

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promise to pay A. M. Wilson, administrator of Hiram Young, deceased, thirteen hundred and forty-six dollars, for 63,000 pounds of seed cotton.

"Witness our hands and seals, this 12th December, 1854.

"A. PITTS, [SEAL.]

"SAM'L GILLIAM, [SEAL.]

"SARAH PITTS, [SEAL.]"

A jury was empaneled to try and determine whether the defendant, Sarah, was joint surety with the plaintiff in said note. They found that she was, and judgment was entered against her for the one-half paid by plaintiff. She appeals, and now assigns errors in the proceedings and judgment.

1. The Court refused to continue the case at the term at which it was tried, upon the affidavits of George Pitts and James Watson, showing that the defendant was desirous to put in and rely upon a plea of *non est factum* in the case, and that she was not able, in consequence of sickness, to attend the Court for the purpose of swearing to the same. The case had been continued, "as on affidavit of the defendant," at the previous term. Continuances are in the discretion of the Court, and we would not reverse its action upon such motions, unless it *clearly* appeared to us that there had been a *very great abuse* of this discretion. We see nothing in the record to make out such a case; but, as it turns out upon the trial, such a plea would have been of no avail to her, and, consequently, she has sustained no injury, as will appear under the second objection taken to the action of the Court. It is not controverted, of course, that this

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motion against her for contribution would be defeated if she *could rely upon and maintain* such a plea.

2. The defendant was not allowed to introduce proof to show that she had not signed the note, but that her name was forged. This was right, even if her plea of *non est factum* had been regularly filed upon oath. Her son, the principal in the note, had previously made a deed of trust for the benefit of his creditors, and, among others, this debt was provided for, and described as a note upon which the plaintiff and defendant were his sureties. In the answer of defendant to a bill against her and others, in relation to this deed, she referred to and claimed the benefit of it, and insisted that the deed was *bona fide*, and the debts secured, just. She, as one of several joint respondents, swore to the truth of the answer. This would unquestionably estop her from ever denying that she was properly bound upon the note, or that she and plaintiff were joint sureties upon it. If she had not accepted the deed it would be different. But here was an acceptance in the most solemn form, by a deliberate answer, in a judicial proceeding, upon oath.

We have decided in another case, at the present term, that a stayor of execution, under circumstances that would not bind him in law, who has accepted a deed of trust for his security, is placed under an estoppel, and cannot resist his liability, though his undertaking was utterly void.

The same principle governs this case, and deprives the defendant of the proposed defence.

The judgment will be affirmed.

Albert A. Mason v. Laban A. Westmoreland.

ALBERT A. MASON v. LABAN A. WESTMORELAND.

1. JUSTICE OF THE PEACE. *Jurisdiction. Endorsee against endorser.* A justice of the peace has no jurisdiction to render judgment in favor of the endorsee against the endorser of a promissory note, for a greater sum than fifty dollars, unless demand and notice are expressly waived in the endorsement.
2. JURISDICTION. *Appeal. Certiorari.* If a justice of the peace exceeds his jurisdiction, by rendering a judgment against an endorser for more than fifty dollars, the latter must avail himself of it by an appeal; or, if ignorant of the judgment, by bringing the cause up to the next term of the Circuit Court for a new trial, by a petition for writs of *certiorari* and *supersedeas*. It cannot be reached by a *certiorari* to *quash* the judgment and execution.

FROM GILES.

At the December Term, 1858, the judgment and execution were quashed by the Court, MARTIN, J., presiding. The plaintiff appealed.

JONES & WARD, for the plaintiff.

WALKER & BROWN, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

One of the questions raised in this record is, whether a justice of the peace has jurisdiction to render judgment in favor of the endorsee against the endorser of a promissory note, above the sum of fifty dollars, unless demand and notice are expressly waived in the endorsement? And we think he has not.

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In the case of *Crocket et al. v. Wright*, decided by the Supreme Court of this State in 1840, (2 Hum., 322,) it was held, in putting a construction upon the acts of 1835, ch. 17, §§ 1 and 2, and 1837, ch. 22, § 1, that the jurisdiction of a justice of the peace against an endorser, did not, in any case, exceed the sum of fifty dollars; and that so much of the act of 1831, ch. 59, as gives that jurisdiction, is repealed.

The jurisdiction has been *since* extended to five hundred dollars, upon endorsements of negotiable paper, where demand and notice are expressly waived in the endorsement. But in the case of an ordinary endorsement, where there is no waiver of demand and notice, there has been no enlargement of jurisdiction whatever. The terms, *obligation, contract, or other evidences of debt*, do not embrace it, as will be seen from the reasoning of the Court in *Mitchell v. Miller*, Meigs' R., 510, and *Crocket et al. v. Wright*, 2 Hum., 322.

The liability of the endorser is contingent, created not by the terms of the instrument, but by operation of law; and the endorsement itself can furnish no evidence of indebtedness without the aid of extrinsic facts.

But to have availed himself of this want of jurisdiction, the defendant should have appealed, if he knew of the judgment within the time allowed for the appeal; and if he did not, the fact should have been stated, as a legal excuse for not appealing, and the *certiorari* should have been for a new trial, and not to *quash* the judgment and execution, and should have been taken to the next term of the Circuit Court, unless cogent and satisfactory reasons were shown why it was delayed almost a year from the rendition of the justice's judg-

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ment. If this had been done, upon a new trial in the Circuit Court, it could, as a matter of *evidence*, have been shown that the justice had no jurisdiction.

But having failed to do this, the judgment must be held valid upon its face, and not open to attack, upon *certiorari* and *supersedeas*, when it comes up collaterally, by parol or other proof, *dehors* the proceeding. The proceedings before the justice do not show in what character the liability of the defendant arose, either in the warrant or the judgment; and the note cannot be looked to in this collateral application, or evidence be heard to show that the recovery was upon an endorsement. *Witt v. Russey*, 10 Hum., 208; *Johnson & Fenner v. Deberry*, 10 Hum., 439.

The result is that the Circuit Judge erred in quashing the judgment and execution, and also in not dismissing the petition for writs of *certiorari* and *supersedeas*, and the judgment of the Circuit Court must be reversed.

But the cause will be remanded, with leave to amend the petition, so as to make a proper case for a new trial upon the merits, if this can be done, by showing a valid legal excuse for not appealing, and also a reason for the delay in the attempt to bring the case to the Circuit Court.

Judgment reversed.

A. F. Mallett *et al.* v. William Hutchinson.

A. F. MALLETT *et al.* v. WILLIAM HUTCHINSON.

1. **CONSTABLE.** *Stay of execution.* A constable, by giving his receipt for the collection of a note becomes, *individually*, the agent of the owner of said note; but this does not confer upon him authority to dispense with the stay of execution upon the judgment before the justice of the peace, so as to prevent the plaintiff from taking his execution immediately, if the judgment is not legally stayed.
2. **CERTIORARI AND SUPERSedeas.** *Judgment upon the dismissal of the petition.* Code, § 8188. Prior to the adoption of the Code, it was the practice, where the writ of *certiorari* was used to quash the execution because of some matter arising subsequent to the judgment, to award, upon a dismissal of the petition, a *procedendo* to the justice of the peace, to proceed to execution upon the judgment before him. This practice is changed by § 8188 of the Code, and a direct judgment is to be given by the Circuit Court against the principal and security in the prosecution bond, for the amount of the recovery, with interest and costs.

FROM MAURY.

At the May Term, 1858, MARCHBANKS, J., presiding, the petition for writs of *certiorari* and *supersedeas* was dismissed, and a *procedendo* awarded to the justice. The defendant appealed.

M. S. FRIRERSON, for the plaintiff in error.

SYKES, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

There is no error in this judgment.

Neither Porter, the officer, nor Pillow, who gave him

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the note for collection, had any authority to dispense with the stay of execution upon the judgment before the justice of the peace, so as to prevent Hutchinson, the creditor, from taking his execution immediately, if the judgment were not legally stayed.

The powers and duties pertaining to the office of constable, are defined and regulated by law. Certainly, as an officer, he had no such power. And though it has been held, that by giving his receipt for the collection of the note, he becomes, *individually*, the agent of the owner, and is bound to take out process, and use reasonable diligence in the collection of the debt; yet this gives him no power to waive the right of the plaintiff, to have execution of his judgment.

And it is equally plain, that Pillow, in this instance, had no such authority, for it is shown by the petitioners that all he was engaged to do, was, simply to hand the note to the officer for collection, which being done, his agency ceased.

It cannot be maintained, that the creditor could be estopped by these unauthorized acts, to which he was in no legal sense, a party.

The case of *Smith v. White*, 5 Hum., 46, is unlike this. In that case the defendant prayed an appeal within the time prescribed by law, and offered to give bond, but was prevented by the justice of the peace who had rendered the judgment, and *whose duty* it was to receive the bond and grant the appeal, until it was too late. This, upon showing merits, was held to be a valid reason why he should be allowed the writ of *certiorari*, as a substitute for the appeal, in order to have a new trial.

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The Circuit Court, upon dismissing the petition, awarded a *procedendo* to the justice of the peace, to proceed to execution upon the judgment before him.

This was in accordance with the practice as laid down in *Kincaid v. Morris*, 10 Yer., 252, and followed in many cases since.

It applied to all cases where the writ of *certiorari* was used, not as a substitute for the appeal, but to quash the execution, because of some matter arising subsequent to the judgment.

This practice is now changed by § 3188 of the Code, and a direct judgment is to be given by the Circuit Court against the principals and sureties, to the prosecution bond, for the amount of the recovery, with interest and costs. But the bond in this case being executed before the Code took effect, the Circuit Court gave the right judgment.

Judgment affirmed.

ALEXANDER HODGE v. WILLIS BLANTON.

BOUNDARY. *Burying ground reserved and boundary not defined.* In the sale of a tract of land the plaintiff made this exception, in the deed: "a small lot reserved for a burying ground, two poles square, around the graves where the said William Hodge and his grand children are now buried." The deed contained no other description of the land reserved. *Held*, that the law would fix the boundary of the reserved

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lot, by making the graves which were there when the conveyance was made, a common centre, from which, by lines equally extended each way, an area of two poles square, is to be laid off.

FROM COFFEE.

This cause was tried at the May Term, 1858, MARTIN, J., presiding. Verdict and judgment for the defendant. The plaintiff appealed.

HICKERSON, for the plaintiff.

COLYAR, for the defendant.

McKINNEY, J., delivered the opinion of the Court.

This was an action of trespass *quare clausum fregit*. The trespass complained of, is the digging a grave, and interring the body of a negro child, the property of defendant, within the limits of a private burying-ground belonging to the plaintiff, and near to the graves of the father and other relatives of the plaintiff.

Verdict and judgment were for the defendant, and the case is brought to this Court by an appeal in error.

It appears, that on the 18th of June, 1853, the plaintiff conveyed to the defendant a tract of land lying in Coffee county, containing upwards of four hundred acres.

The deed contains certain exceptions and reservations, and especially the following, namely: "A small lot re-

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served for a burying-ground, two poles square, around the graves where the said William Hodge and his grand-children are now buried." At the time of making said deed, there were but three graves at the place where the reservation was made, which lay side by side. It seems that the exact boundaries of the "two poles square," have never been defined by agreement of the parties. It further appears, that since the execution of the conveyance to the defendant, two other persons, relatives of the plaintiff, have been interred, immediately south of the first three graves. And within some three feet of the last grave, the negro child of the defendant was buried.

In the legal forum, the only question that can be raised upon the facts of this case, is simply the question of boundary. Upon this question the parties differ in opinion. The plaintiff's counsel insists, that the lot is to be so laid off, as to give two square poles, exclusive of so much ground as was occupied by the three graves which had been made prior to the conveyance; and, on the other hand, it is insisted that the plaintiff is entitled to only "two poles square," including said graves.

His honor, the Circuit Judge, instructed the jury, in substance, that in the absence of any agreement of the parties, the law would fix the boundaries of the reserved lot by making the three graves which were there when the conveyance was made, a common centre, from which, by lines equally extended each way, an area of "two poles square" was to be laid off.

This, we think, was the proper construction of the clause of the deed declaring the reservation; and the

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proper method of ascertaining the correct boundaries of the lot. In thus laying off the lot, all the graves of the family of the plaintiff will be included within its limits; and the grave of the negro child will be excluded.

The judgment will be affirmed.

FOUNTAIN OWEN AND WIFE v. C. C. HANCOCK *et al.*

1. **WILL. Construction of.** The will of Jacob Adams contained the following clause: "*Sixthly.* I give to my daughter, Mary Cooper, a negro girl named Celia, during her lifetime, and if she should die without any heirs born of her body, the said negro girl and her increase to return to my estate, and be equally divided among the rest of my children." It is held, that, by this clause the testator disposes of the slave and increase, to his daughter for life, with remainder to his, the testator's, children, in the event she died without "heirs born of her body," which means children. But upon the marriage of the daughter, and the birth of children, the marital right of the husband attached, and, by operation of law, the title to the slaves passed to, and vested in him.
2. **FAMILY COMPROMISES.** Family compromises, fairly and reasonably made, to save the peace of a family, and prevent family disputes, will be sustained by a Court of Equity. And if, upon a doubtful question of construction of a will and uncertainty as to the rights of the children; the father, children, and neighbors selected to settle their rights, join in consultation, and deliberately agree upon terms of compromise and settlement, which are reduced to writing and signed, there being no unfair advantage taken, or imposition practiced, a Court of Equity will not interpose and set the same aside at the instance of a party who may have acted under a mistake as to his legal rights, and surrendered a legal advantage.

FROM CANNON.

This cause was tried before Chancellor RIDLEY, at the October Term, 1858, who pronounced a decree for the complainants. The defendants appealed.

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JORDAN STOKES, for the complainants.

M. M. BRIEN, J. L. FARE and Jo. C. GUILD, for the defendants.

CARUTHERS, J., delivered the opinion of the Court

Richard Hancock died in Cannon county, Tenn., the 15th of July, 1855, leaving a widow and three children, the complainant, Alaminta, and the defendants. This bill is filed for the settlement of the estate, and to set aside a division of the slaves and other property made by the intestate and the parties, a day or two before his death. The slaves are fifteen in number, and are all, together with others given to the children before the last division, the descendants of "Celia." The first question which arises in the case, is as to the title to her; whether Richard Hancock had an estate for the life of his wife only, with remainder to her children, or the entire estate. This question is only important now, (as the children have received the slaves, and had a division of them,) on a question of advancement. On the marriage of Alaminta to Owen, two of the oldest of Celia's children were placed in their hands as a gift, as they say, and they have increased considerably, and in the last division they accounted for them at their then present value; upon the idea that they only got the life estate, and that they were subject to the remainder interest of all the children, when, if they got the absolute estate by the gift, they would only be liable to account for their value at the date of the gift, as an advancement. This would make a very great difference

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in the amount of their share of the fifteen slaves. The complainants allege that they were mistaken as to their rights, when they went into the recent division, and accounted for the present value of the slaves advanced to them, and signed the writing in relation thereto. They charge, that the defendants misled them, by stating that they had submitted to lawyers the clause of the will under which the title originated, and had legal advice to the effect stated, upon it; that they are now informed that the true construction excludes any remainder in the children, but gives the absolute estate to their mother, to which the marital right of their father attached. This statement shows that the first step towards the adjustment of the rights of the parties, is to place a construction upon the sixth clause of the will of Jacob Adams, made in North Carolina, in the year 1807. It reads; "*Sixthly*, I give to my daughter, Mary Cooper, a negro girl named Celia, during her lifetime, and if she should die without any heirs born of her body, the said negro girl and her increase, to return to my estate, and be equally divided among the rest of my children."

Here is a disposition of the slaves to his daughter for life, and no express disposition over, except in one event, that she should die without "heirs born of her body," which, in that connection, clearly means children, and in that event, to go to his, the testator's, other children. This contingency did not happen, for she died in 1853, leaving three children—the complainant, Alaminta, and defendants. It cannot then return to his estate, and the question is, where does it go, when the event upon which it was to go over under the will became impossible? The position of defendants is, that

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an estate by *implication*, the remainder, was vested in the children of the tenant for life. If that be so, the controversy is ended, as the division now impeached, was made upon that construction. This construction is, to say the least of it, plausible, and the question is one upon which sound legal minds might differ, as it seems they did in this case.

An estate by implication can only be sustained on the principle of carrying the testator's *intention* into effect. That rule may be illustrated by examples like these: A devise over after the death of the wife, or the arrival at age of a child, without expressly giving them any estate, would confer by necessary implication, an estate for life, or during minority. In these, the estate is disposed of in a manner to indicate unerringly, that the use was to be in the persons named until the happening of a certain event; there was no contingency. But here there is no reference to the heirs or children, with a view to give them any distinct estate, but only to specify an uncertain event, by which the rights of others were to be governed. That is, if no children were born of the daughter, then the bounty should not go to strangers to his blood, but return to his other children; but if she should have children, then the reason of limiting the estate to her life, no longer existed, and by making no disposition of it in that event, he clearly intended that her estate should be absolute and unlimited, and the property subject to all the ordinary rules applicable to the personal estate of married women, with reference to the marital rights of husbands, and the laws of distribution. To avoid these consequences, and secure benefits to children by way of what is familiarly called the en-

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tailment of property, there must be something tangible and explicit, so that persons dealing with it may not be entrapped.

In the will of Armstead Moore, there was a clause very similar to this, which we construed at last term, (5 Sneed, 127,) as we now do this.

Perhaps the only difference is, that there the estate given was general, dependant upon the contingency of dying without heirs of the body, and here it was for "life" in terms. Can this make any difference in the construction? We think not; and so are the authorities. 2 Bro. Ch. R., 448; 2 Powel on Dev., 602; 22 Law Lib., 821. This is contrary to some of the old cases, but is now well settled. So the life estate expressly given, was enlarged into a fee, upon the birth of a child.

So our opinion is, that the Chancellor was right in holding, that upon the marriage of Richard Hancock in 1809, with the widow, Mary Cooper, and the birth of children, he became absolute owner of the slave Celia and her increase, and could dispose of them by advancement or otherwise, as he chose. And it must follow, that a gift to the complainants after they married, unexplained, would be an advancement; and only to be accounted for by them, in the distribution of his estate after his death, at their value when advanced. Such was the decree of the Chancellor, with the necessary account, upon that basis. To reach these results, it was necessary to make void and set aside a division of the property made by the parties at the instance of the father, a day or two before his death; and a bond signed by them all at that time, in which the slaves

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given to complainants had been accounted for by them at their increased value.

This raises the next and most difficult question.

It seems that on the marriage of complainants, some twenty-five or thirty years before, Jenny, a child of Celia, with her child Minta, were placed in their hands by Richard Hancock, and were by them retained and claimed as their own, down to this division. That they had increased to seven; that four of them had been sold, and the other three still retained. A short time before the death of the old man, a difficulty seems to have sprung up among the children, as to their rights in relation to the descendants of Celia—whether they were entitled in remainder, after the death of their mother in 1853, under the will of her father, before set forth and construed; in which event the complainants would be bound to return or account for those held or disposed of by them, at their value at the end of the life estate; or if there was no remainder then, their title by gift was good as an advancement, and they would only be bound to account for the value at the time received, which is proved to have been only five or six hundred dollars.

Their father was very anxious to have the matter settled before he died, and that there should be no contention among his children after his death. Steps were taken to bring the parties together at his house, two or three days before his death, to settle the matter. It appears from the proof, that the old man was not exactly certain as to the nature of his title. He most generally acted and talked in relation to these slaves, as if they were his own, absolutely, both before and since the death

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of his wife; and at other times, said they were his only for the life of his wife, and after that, belonged to the children. Her conversations were to the same effect, and such seems to have been the case among the children. And it was certainly a question about which they might honestly differ, and upon which their opinions would be apt to, and did fluctuate.

Four or five of the neighbors were requested to attend on the day designated, and make an equal division of all the slaves descended from Celia, including those that complainants had sold, and still held. The referees refused to act, until the parties agreed on some principle on which it was to be done. The difficulty seemed to be in reference to the slaves of complainants; how they should be accounted for. If at the value of the two when received, they would be entitled to a share in the fifteen on hand; but if for their value at that time, they would be entitled to no more; but the fifteen would go to defendants. The dissatisfaction of complainants appeared to be on the ground, mainly, that as they had raised the slaves, the benefit of their increased number and value ought not to inure to the brothers. The consideration, on the other side, was, that they had enjoyed their labor and services for a long period, and had sold four of them, and had the advantage of the proceeds. The complainants, however, brought their slaves forward, and finally acquiesced in the arrangement by which they were to keep the slaves they had, and get another, named Clark; and the fifteen remaining on hand, were to be equally divided between the brothers. This was about equal, or at least there is no complaint of it on that ground. This agreement was reported to the

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referees, and their services were dispensed with. The old man, on being informed of what had been done, was rejoiced at it, and proceeded to close up all his business upon that basis. He divided out his cash notes equally, between his sons and complainants, being \$3000 each, after setting apart \$1,000 for the widow. These were delivered over to the parties, and complainants went home with their notes and slaves. He also deeded his remaining lands to his sons, and died the next day. The fifteen slaves were not removed on the day of the division, but remained upon the place. No writing was executed upon the division.

These facts cannot affect the question. The title was then in Hancock, the father, and he sanctioned and ratified the division, and by that relinquished his title to the parties, respectively, before his death; nor does his personal representative take exceptions, or claim any of the slaves as the property of the estate. It is not for the complainants to make objections on that ground, because they took and held possession of the share allotted to them, both as to slaves and notes. No right had descended to any of them at that time, as the owner still lived. But the possession may be regarded as passing on that day, as the parties, and the slaves were all present, and the fact that they were not removed before the death, can make no difference, so far as the complainants are concerned. If the administrator could possibly make this question, which we do not concede, yet, certainly, they cannot. For the same, and other reasons, the want of a written conveyance from the old man does not invalidate the agree-

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ment, and prevent the passage of the title to the parties, under the circumstances.

Something is said in argument about the invalidity of the consent or waiver of her rights by complainant, Alaminta, on account of her *coverture*. She had no rights to waive; none had vested in her by the death of her father at that time, in the fifteen slaves, nor had she any in the others claimed as an advancement; for to them the marital right of her husband had attached. And even after the death, the right she would have by descent, in personalty, would be under the husband's control, subject only to the wife's equitable claim to a settlement until possession had been obtained, or the right legally disposed of by him. But in this case, no rights existed in any of them to the fifteen slaves, and none could or did pass from one of them to the other, but only from the owner. It does not change the nature of the transaction, that he called them, or others into consultation, and chose to conform his action to their agreement, among themselves.

There is no doubt but that complainants, as well as defendants, acted upon the idea, that by the will they were entitled to the remainder in the slaves, and that it was what they called entailed property. There can be no doubt either, but that such was honestly the opinion of all concerned, at that time. It is very likely also, that complainants would not have agreed to the arrangement they did, if they had not believed the law would compel them to do so. But there is just as little doubt that equity and equality has prevailed over their strict legal right, and this was ardently desired by their father. He certainly had the unquestionable power, by gift or

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will, to have produced precisely the same result, and we cannot tell but that he would have done so, if the parties themselves had not agreed to it, on that day. By the arrangement, the complainants have only been deprived of a legal advantage they possessed, and might have retained, provided the old man had not taken the matter into his own hands, in case they had refused, and carried out his desire for equality by the exercise of his undoubted power of disposition, by giving the fifteen slaves to his sons, to make them equal with his daughter in the whole of the slaves in question.

On the 12th of July, 1855, when the four neighbors met, as before stated, for the purpose of making the division of the slaves, a writing was drawn up by one of them, Joseph Clark, binding all parties to stand to their action in the matter, under a penalty of \$8,000.

This article was signed by all the parties, and by it they agreed that they should value, and equally divide into three parts, all the slaves, that is, the fifteen on hand, and those then held, or which had been sold by the complainants. As before stated, these men did not perform the duty assigned them, but the parties agreed upon the division themselves, and reported to them on the second day, 18th of July, that they had been able to come to an agreement among themselves, and with that they were all satisfied, and the referees thereby relieved from the duties imposed upon them in the writing.

Under all these circumstances, should a Court of Equity restore the complainants to their legal advantage, on the question of advancement, and interfere with the solemn agreement of the parties, by which equality and

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justice were produced? We think not. It was a family settlement, in which the father, the children, and their select neighbors joined in consultation, and deliberately agreed upon terms of adjustment. The complainants took the benefit of three thousand dollars and an additional slave under it, and should not now be heard to complain. It was a doubtful question of construction upon a will, and it was not improper to settle it by agreement and compromise, as a case of uncertainty, about which honest differences of opinion existed. There was no unfair advantage taken, or imposition practiced. If the complainants were mistaken as to their strict rights, it was a mistake of law on a question of very doubtful solution. If they acted upon their own judgment, or the reported opinion of others, without fraud or misrepresentation, as we think they did, they must abide by their contract and agreement. There is nothing in the case to move a court of conscience to relieve them. This view avoids the necessity of noticing many other questions made on argument, and sets aside the account, with the exceptions.

The decree will be reversed upon this ground, the adjustment of their rights made on the 18th of July, 1855, will stand; and the account taken, and the estate finally settled on that basis.

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B. J. THOMPSON v. JOSHUA JONES.

DEED. Delivery of. As to whether there has been a delivery of a deed, is a question for the jury, open to parol evidence, and may be inferred from circumstances. The execution of a deed, and procuring it to be registered, is not conclusive evidence of delivery; but it is *prima facie* evidence of the fact, and is sufficient to throw the *onus* upon the bargainer of proving that he did not intend it as a final delivery; but it was his purpose still to hold it in his power, and not then to take effect.

FROM FRANKLIN.

This cause was tried at the November Term, 1858, MARCHBANKS, J., presiding. There were verdict and judgment for the defendant. The plaintiff appealed.

HICKERSON, ESTILL, and TURNER, for the plaintiff.

COLYAR, for the defendant.

CARUTHERS, J., delivered the opinion of the Court.

This is an action of replevin, brought by Thompson to recover the possession of a slave named George, which he claims as hirer, for the year 1857, against the defendant, Jones, who sets up title in himself, and denies the claim of the plaintiff. The action failed, and the case is here by appeal in error.

Mary Cunningham was the owner of the slave, and by a deed of gift, dated the 6th of October, 1856, conveyed him to Joshua Jones, and his wife Delilah.

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The main question argued is as to the delivery of the deed, and this is made the controlling point in the case. If there was a delivery, the title thereupon passed to Jones and wife, and the contract of hiring, made with Mrs. Cunningham, after that time, would confer no right upon the plaintiff, and the possession taken and retained during that year by the defendant, was legal and proper.

The facts, as to the delivery, are these:

At the request of the old lady, R. B. Roberts wrote the deed of gift, which she signed by making her mark, and the same was attested by said Roberts and Mrs. M. E. Shied. She then gave Roberts the register's fee and requested him to carry the deed to the register and get it registered, which was done in due form, after probate on the same day by both witnesses, before the clerk. After this was done, and the proper certificates placed upon it, Roberts carried it back to her, at Shied's, where she was then staying, and informed her that he returned it registered; when she requested him to give it to Mrs. Shied, which he did. This was some weeks or a month after the probate and registration.

This is the substance of the evidence of Roberts. He does not state that she gave him any instructions what to do with the paper after he attended to the probate and registration of it; and so he returned it to her, and placed it with Mrs. Shied, as she then directed. The donees were not present, and lived in another county. After all this was done, the contract of hiring was made by Mrs. C., or Mr. Shied, at her direction.

The Court, in charging the jury, makes the case

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turn entirely upon the question of delivery, and instructs them very fully upon the law on that subject, carefully observing the line of demarkation between the law and the facts of the case.

It is not controverted, and is every where held, that delivery is necessary to a deed. 4 Kent, 454. It may be by express words, or the acts of the party. If the parties evince, by what is done, in any clear and unequivocal manner, the intention of delivering the deed, it is sufficient. Addison on Con., 7. Delivery is a question for the jury, open to parol evidence, and may be inferred from circumstances. *Ib.*, notes.

Whether the mere execution and delivery to the register, for registration, will amount to a delivery, is a question on which there is some conflict. In *McEwen v. Troost*, 1 Sneed, 191, it was held that the mere "delivery to the register for registry" was not a delivery of itself; but if the grantor directed it to be "recorded, or subsequently assented to it," that would be equivalent to actual delivery.

The Court stated to the jury the facts that were proved in this case, as they are above set forth, and charged that they amounted to a *prima facie* case of a valid delivery and acceptance, and would pass the title, unless rebutted by proof that such was not the intention. That is a correct statement of the law.

The execution of the deed, and procuring its registration, would not be conclusive of delivery; but it would devolve upon the other side the necessity of proving that she did not intend it as a final delivery, but that it was her purpose still to hold it in her own power,

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and that it should not take effect while she lived, or only upon some condition or contingency.

In this case, however, the proof shows that the gift was a settled purpose with her; that she referred to it afterwards as a binding and complete transfer of the title, with other facts, showing that she regarded the act as consummated and final.

The jury very properly found, from all the facts, that the deed was delivered, the title of defendant complete, and the plaintiff had no right, under the unauthorized contract of hiring made by the agent of the donor, after she had divested herself of the title.

Let the judgment be affirmed.

JOHN P. HEFNER v. LEWIS METCALF.

FRAUDULENT CONVEYANCES. *What meant by the words hinder and delay creditors.* The words "hinder and delay" are to be taken in their legal or technical, and not their literal sense. The statute refers only to an improper or illegal hindrance and delay; not to such as is reasonable and fair in the exercise of the well established right to prefer creditors. Hence, a conveyance made to prevent creditors from sacrificing the property of the debtor, by a sale; or to prevent a race of diligence among his creditors for his property, by appropriating it to preferred creditors, is not within the statute, and is valid.

FROM FRANKLIN.

At the July Term, 1858, MARCHBANKS, J., rendered judgment for the plaintiff, on the agreed case. The defendant appealed.

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COLYAR, for the plaintiff in error.

TURNER and ESTILL, for the defendant in error.

CARUTHERS, J., delivered the opinion of the Court.

A. Jordan, on the 23d of December, 1857, being largely indebted, and having on hands, as a merchant, a stock of goods of the value of upwards of five thousand dollars, made an assignment of the same, on that day, to Lewis Metcalf, as trustee, for the benefit of specified creditors. The defendant, as a constable, held sundry executions, issued by justices of the peace, against Jordan; some on judgments rendered before, and others after the date of the deed of trust, amounting, in the aggregate, perhaps, to the full value of the goods. Many of these, if not all, are embraced in the deed; but there is a discrimination against some or all of those who had sued, in case of a deficiency. The trust was to be closed during the next year, and the goods to be sold for cash, by Jordan as agent of the trustee, or otherwise, for the purposes of the trust.

Upon the validity of this deed a dispute arose between the officer and the trustee, and an agreed case was made up by them, under the statute on that subject, and submitted to the Circuit Court. The decision was in favor of the deed.

The argument here, in favor of reversal, is based upon this statement in the case agreed:

"It is agreed that the object of making said deed of trust was to prevent such of his creditors, who were about to sue, or might sue said Jordan, from sacri-

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ficing his goods by sale, when he desired that his goods should not be left to a race of diligence among or between his creditors; but he desired that he should have the opportunity, through his trustee, of selling the goods, as provided in said deed, and of distributing the funds rateably, as therein provided."

There is nothing in the deed itself, no defect in its provisions upon its face, which are assailed in the argument. As no question is made upon that, its provisions need not be noticed. There is no doubt about the debts set forth being real, or that there is an excess of property, or any other of the common badges of fraud, palpable in the deed.

But the objects and purposes of it, as admitted in the agreement, are the grounds of attack. It is insisted, that to make an assignment to prevent the "*sacrificing of his goods by sale*," to be made by his creditors, or to protect them from a "*race of diligence among his creditors*," is equivalent to the words of the statute of frauds, "*made to hinder and delay creditors*." We are referred to Burrell on Assignments, 391, and some reported cases cited by him in a note, to sustain this position. The statutes of frauds of the different States, as well as their insolvent laws, are so dissimilar in their provisions that we are not able to determine what weight should be given to their decisions on those subjects in a controversy under our laws.

The words "*hinder and delay*" are to be taken in their legal or technical, and not their literal sense, or no deed could stand where all the creditors were not provided for. If this were otherwise, the right to prefer one creditor to another, where a debtor cannot

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pay all, would be defeated. But "a debtor may prefer one creditor, and secure his debt, though others may suffer loss." 8 Yer., 134. He may, at any time before a *lien* has been obtained upon his property by judgment in Court or levy, appropriate it by *bona fide* sale or assignment to the payment or security of other creditors. This will not fail, because a reasonable "delay" is taken to sell and apply. He may thus interpose obstacles in the way of others; that is, "hinder" them, as well as "delay them." The statute only refers to an improper or illegal hinderance and delay—not such as is reasonable and fair in the exercise of the well established right to prefer creditors.

If it appeared from his own acknowledgment, or otherwise, that his object was to defeat certain creditors entirely, in the collection of their debts, though in suit, by the assignment of all his property for the payment of other creditors, what would that be more than what is implied in all assignments. That is the object always, where all cannot be paid. There is no other reason for allowing him to elect who he will pay—that is the essence and reason of the rule. If he had said, then, that his object was to defeat one set of creditors entirely, by applying all his property to others, it would not have made it fraudulent, much less to prevent the latter from "sacrificing his property." If his purpose was to prevent a "race of diligence among his creditors" at law for his property, by appropriating it to preferred creditors, this would not be fraudulent, because it was just what he had a right to do. The rule contended for would compel him to surrender this long established right to choose among his creditors,

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where some had sued and others not. It would not be controverted that a debtor might, at any time before a judgment and levy, except where the judgment would create a lien, confess a judgment to another and surrender his property in satisfaction, so as to defeat the first suit. An assignment to pay debts is of equal force, and, where there is no fraud, will defeat those who have been more vigilant in suing.

The suing creditors are striving, in a legal way, to make their debts to the exclusion of others, and have no right to complain if they are superseded by another legal mode of obtaining satisfaction—outrun, in the “race of diligence,” by a different road. It is only a fair contest between creditors, by different legal means, to secure themselves. Perhaps a *pro rata* distribution of the property would be the most equitable; but that is not our system, and other rules must prevail. Here the contest between the two sets of creditors is, which shall have all to the exclusion of the others; not for equitable distribution. They are equally meritorious, and the strongest legal right must prevail.

The judgment of the Circuit Court upon the agreed case was right, and will be affirmed.

Sewanee Mining Co. v. John McMahon.

SEWANEE MINING CO. v. JOHN MCMAHON.

PRINCIPAL AND AGENT. *Evidence. Declarations of the agent.* The acts and declarations of an agent, during the continuance of the agency, in the lawful prosecution of the business of the principal, respecting the matter in litigation, are admissible in evidence to bind the principal.

FROM GRUNDY.

This cause was heard at the September Term, 1858, MARCHBANKS, J., presiding. There were verdict and judgment for the plaintiff. The defendant appealed.

R. J. MEIGS, for the plaintiff in error.

A. S. COLYAR, for the defendant in error.

WRIGHT, J., delivered the opinion of the Court.

There is no error in this judgment.

Backus was the general agent of this company in the construction of its road, and the transaction of its business; and what he done or said, during the continuance of that agency, in the lawful prosecution of the business of the company, respecting the subject matter of this suit, was admissible in evidence to bind the company. Indeed, there can be no other way of reaching a corporation, save through the acts and declarations of its agents. 1 Greenl. Ev., §§ 113 and 114.

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It is next assigned for error, that the Circuit Court permitted the evidence of James Ryon and E. L. Best to go to the jury, they being alleged to be incompetent as witnesses. No grounds are set forth in the brief, showing us how they are incompetent; and we have been unable to find any reason for excluding their testimony. Ryon appears to have been the agent of this company to borrow of the plaintiff the money for which the suit was brought. 1 Greenl. Ev., § 416.

Judgment affirmed.

GEORGE P. GASSAWAY *et al.* v. SAMUEL HOPKINS *et al.*

1. **DOWER.** *In slaves. Law of Kentucky.* By the law of Kentucky, slaves are placed, as to the widow's dower, upon the same footing as realty; and she is entitled to one-third of the slaves during her life, with remainder to the heirs at law of the deceased husband.
2. **SAME.** *Same. Same. Forfeiture of, by removal.* If the second husband of a widow endowed of slaves belonging to the estate of her previous husband, remove the slaves beyond the limits of Kentucky, he forfeits his right to them; and the remainderman may possess and enjoy all the estate which such husband holdeth in right of his wife's dower, for and during the life of said husband. This forfeiture does not accrue upon a *sale* by the husband in the State, nor upon the removal of the slaves, by the purchaser, from the State.
3. **STATUTE OF LIMITATIONS.** *By what law regulated.* Each State has the right to settle the time within which suits must be brought, or may be litigated in its own Courts. Hence, the law of the State where a suit is instituted, without regard to where the cause of action originated, governs, as to defences upon prescription, or limitation of actions.
4. **SAME.** *When it begins to run against a title in remainder to slaves held as dower under the law of Kentucky.* Though the husband may

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forfeit his interest in slaves of which his wife is endowed by the law of Kentucky, the wife may reclaim such interest if she survive her husband. The remainderman, however, is not bound to urge the forfeiture, and in that event, time will not commence to run, to the prejudice of his right, until the life estate terminates.

FROM LINCOLN.

This cause was heard at the August Term, 1858, before Chancellor RIDLEY, who pronounced a decree for the defendants. The complainants appealed.

JOHN M. BRIGHT, for the complainants, said :

1st. The forfeiture applies only to the slaves "he holds." See 1 Monroe's and Harlan's Ky. Dig., 518, sec. 5; *Gales' heirs v. Miller*, citing 8 Monroe, 417; hence, if he had previously removed and sold one, it would not apply to him.

2d. The slaves that may have been sold before the act of forfeiture, are not forfeited and lost to the purchaser; consequently, the remainderman would have no right of action until the termination of the life estate. See same Dig., p. 518, § 6; citing 8 Monroe, 419.

3d. The purchaser of slaves held in dower, may remove them out of the State, and not incur a forfeiture of either the slaves removed, or those retained by him in the State. Hence, complainants had no right to sue defendants, even though the slave was sold out of the State. Same Dig., p. 518, § 7; citing same, p. 420.

4th. The statute of forfeiture "applies only to the widow and her husband." Hence, the defendants cannot

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interpose the act of forfeiture as a defence, which has no reference to him, only to give him the full benefit of the life estate, and it is all it gives, and it is no ground of complaint. Same Dig., p. 518, § 8; citing same, 420.

Then in any and every aspect of the case, I insist that the complainants are entitled to a decree for the slaves.

KERCHEVAL, for the defendants, argued:

As to the statute of limitations:

1st. By the act of 1798, sec. 28, of the Kentucky Statute, negroes are *taken* and *adjudged* to be *real* estate, and descend to the *wives* and widows, as real estate descends. See Vol. 2d of Ky. Statutes, p. 1476, sec. 28.

2d. By the act of 1796, sec. 2, page 562-3, vol. 1, same shall descend to a man's children if he have any.

3d. By the act of 1797, sec. 28, vol. 1, page 660, the wife is entitled to the *use* of one-third of the negroes of her intestate husband, for her *life*.

Then it is clear, upon the death of an intestate father and husband, the *legal title* to his slaves descends to his children, with the wife's right to the *use* of one-third of them during her life.

4th. By the act of 1797, sec. 25, page 1545, vol. 2, if any widow shall remove, or voluntarily permit to be removed out of the Commonwealth, any dower slaves,

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without the consent of those in remainder, such widow shall forfeit such slaves to those in reversion.

And by 26th section of the last act, page 1545, if such widow should marry, and her husband should remove, or *voluntarily* permit to be removed, such slaves, he shall forfeit his interest in them, and it shall be lawful for those in reversion, "*to enter into and possess and enjoy, all the estate* he has in and to such slaves." This is so, whether the remaindermen are minors or not. See *Gales' heirs v. Miller*, 3 Monroe, 418.

5th. All the right which a widow acquires to any of the slaves of her intestate husband, is a *use* during her life; and upon her second marriage, all that right is vested in her second husband. See the case of *Hawkins v. Craig and wife*, 6 Mun. R., 256, and *Hykes and wife v. White*, 7 J. J. Marsh. R., 134. These cases are referred to on pages 1777-8, and note, in the Kentucky Statutes.

Then upon the voluntary removal of such slaves, the right he has is *forfeited*, the reversioners have a right to *enter upon and possess* said right. 8 Monroe, 418.

But we have seen that the children have the *legal estate* in the slaves, and the mother and wife, and her second husband, only have the *use* of such slaves during the life of the widow, then, upon the voluntary removal of such slaves, the reversioner, has not only the *legal title*, but he has also the right to enter into the possession of such slaves, and his title thereby becomes absolute and complete.

And if then there is any adverse holding to their title, the statute would begin to run, and he or they

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would have a right of action. See *Stevens v. Bomar*, 9 Ham., 550; *Price and wife v. Smith*, decided by this Court term before the last, at Nashville.

And having begun to run, it will continue, whether the remaindermen are minors or not. The complainants were all in *esse*, and were unmarried, when Lucy was removed, if at all, and said negro has been held adversely for forty years.

6th. But it is contended for the complainants, that this life estate or use in dower slaves may be sold in Kentucky, and by the *purchaser* removed beyond the State without working a *forfeiture* of that dower interest.

For argument sake, grant this: Yet, if the *husband* of a doweress remove said slaves, or voluntarily permit it to be done, the dower interest is forfeited. See Monroe and Harlan's Dig. of Ky R., p. 518, sec. 5.

7th. That the husband himself removed said slave, see the deposition of George Galloway, taken in February, 1858, in which he says: "I know my brother took said Lucy, as the agent of Gassaway, out of Kentucky," &c., &c.

8th. But it is said by complainants here, in argument, that by the decisions in Kentucky upon their statutes, the reversioner is not bound to sue to save the statute of limitations, until the termination of the life estate; if so, this is at war with all principle upon this subject; for it is believed to be a universally received opinion, that whenever there is a *cause of action*, and the statute of limitations has any application to the subject, it will begin to run, in all cases, from the time said cause of action accrued, except in the cases reserved in the statute.

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But be the Kentucky decisions what they may, they have no application to this case in this State. Because the statute of limitations does not affect the *right* to the property, but the *remedy* to recover.

And not the law of the place where the contract was made, or the *right of action* accrued, but the law of the *forum*, or where that right of action is attempted to be enforced, is to govern in determining any particular case.

This principle is so well established, that I deem it unnecessary to trouble the Court with any authority upon this question. And upon both points, the complainants bill ought to be dismissed.

CARUTHERS, J., delivered the opinion of the Court.

David Lessenberry died in Kentucky, in 1818 or 1819, leaving Loriania, his widow, and the complainants, his children and heirs. Shortly thereafter the widow intermarried with one Benjamin Gassaway. At the May Term, 1820, of the County Court of Barren County, commissioners were appointed to lay off and allot to the said Loriania, her dower in the slaves of her deceased husband.

They allotted to her two of the slaves, one named Allen and the other *Lucy*, on the 21st of August, 1820, and the same went into the possession of the said Loriania and her second husband. After remaining with them a year or two, it is charged that the said Lucy was sold to a man named Galloway, and by him re-

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moved from the State, and sold to the defendant, Hopkins, "some twenty-five or thirty years ago." One of the children of Lucy, named Keziah, was sold by Hopkins to one Leatherwood, the other defendant. Lorania and her husband both died in 1854, and this bill was filed in March, 1855.

The complainants claim the slaves upon the ground that, by the laws of Kentucky, their mother only had a life estate, and they a vested remainder.

The defendants assume two grounds of defence:

1. That the slave Lucy, owned by defendant, Hopkins, was not the same that was assigned to the said Lorania, as dower, in her husband's estate. This is a question of identity, which must be decided by the proof. Hopkins admits that he bought a girl by that name, in 1820, not from Galloway, but Isaac N. Bonds. He says she was then about fourteen years old, and had no children; but she died in 1853, leaving ten children, now in his possession, except the one sold to Leatherwood.

John S. Barlow, an old citizen of Barren county, proves, that when he was a young man, he went with Galloway, with some five negroes for sale, to Alabama, and that one of them was named Lucy, then about fourteen or fifteen years old, as well as he can recollect; he thinks that was her name, and he judges of her age from her appearance. This girl, he says, Galloway sold to a man by the name of Bond or Bonds, living some seven or eight miles from Huntsville, in Alabama. Hopkins says, in his answer, that he bought his girl, Lucy, from Isaac Bonds, Madison county, Alabama, in the year 1820, to the best of his recollection." He

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says he took no bill of sale, and does not give the time of the year. Barlow says it was in February or March, 1820, as he thinks, but it may have been 1821. Neither Hopkins nor Barlow seem to be certain as to the year. Here is a striking coincidence as to the name of the slave, her age, and the name of the person to whom Galloway sold, and from whom Hopkins bought, and the residence of the purchaser. And this shows, also, that the girl Lucy, owned by Bonds, was brought from Kentucky by Galloway, and it does not appear that Bonds owned any other girl slave of that name; that is, there is no proof on that subject.

Samuel Everett proves that the girl, Lucy, was allotted as dower, and that a short time after, she was missing, and he has not seen her since, and was informed she was sold.

It is proved by James Dodd, that Joseph Galloway bought or had a girl upwards of twenty-five or thirty years ago, and took her off for sale, and that he never knew him to have but the one. He also states what Galloway told him about buying this girl from Gassaway, and the dispute between him and his brothers in relation to the title, and what he said about it; but that cannot be looked to, because it is hearsay, and was objected to.

The deposition of George Galloway puts the fact beyond dispute.

One witness for defendant proves that he, defendant, owned Lucy in 1818. This is evidently a mistake as to date, for the defendant, in his answer, does not pretend that he bought her from Bonds earlier than 1820.

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There are some difficulties as to dates in the proof of Barlow, and other witnesses; but upon a full examination of all the evidence, there is not the least doubt left upon the mind as to the identification of the slave Lucy. This was not the difficulty with the Chancellor, as he expressly places his decree against complainants upon the statute of limitations.

2. The defendants' solicitor contends that the right of action accrued to the complainants in 1820, when the slave was sold by the widow, or her second husband, and removed from the State. It is not controverted that the law of Kentucky, as adopted from her mother State, Virginia, is, that slaves are put upon the same footing as realty as to the widow's dower. Act of 1797, 2 Dig. L. K., 1545. That is, she is entitled to one-third of the slaves, but for life only, with remainder to the heirs at law of the deceased husband. It is also conceded in the argument, that, unless sanctioned by the heirs, a removal of them from the Commonwealth is a forfeiture of the life estate. Secs. 25, 26. The defence on this point is, that, at the date of the sale by Gassaway to Galloway, and removal of the slave from the State by the latter, in 1820, a right of action accrued to the complainants, as remaindermen, and, consequently, their right has been long since barred. That would, unquestionably, be so if there was nothing else in the case but that which is assumed in the proposition.

There is no question better settled than that the law of the State where a suit is brought, no matter where the cause of action may have originated, must

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govern as to defences upon prescription or limitation of actions. *Story on Con. Laws*, §§ 576, 577.

Every nation or State must have the right to settle the time within which suits must be brought or may be litigated in its own Courts. *Ib.*, 578.

The time for the bar, then, in this case, is that which is fixed by the limitation acts of Tennessee. The suit was instituted in proper time after the death of the widow—less than three years. If the life estate had not been forfeited, there would be no question but that the statute would only begin to run from the termination of the life estate, at her death, for their right to sue then first accrued. But the defendant takes his stand here, and contends that the time of the forfeiture is the period at which the action accrued. The provision in the 26th section of the Kentucky act is, that “in such case”—that is, where the husband removes, or permits to be removed, out of the State such slaves—“it shall be lawful for him or her in reversion to enter into, possess, and enjoy all the estate which such husband holdeth in right of his wife’s dower, for and during the life of said husband.” This applies, of course, to a case where a second husband removes, or causes to be removed, the dower slaves out of the State; and that is the case we have. If the remaindermen had asserted their right, then, and the mother had outlived her husband, she might have regained the slaves, and enjoyed them for the remainder of her life. But both are dead in this case, and that is not important. As to the effect of this statute in relation to the point in question, that is, when the right to sue accrued, we must look to the laws of Kentucky, as established by

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the construction of their Courts upon their own statute, upon a principle of comity, well settled, as international law. This must furnish the rule for our Courts, in a case coming from Kentucky. Our acts of limitation must be applied, but as to the inception and character of the right, we are to look to the laws of that State. Upon this distinction the case must turn.

In *Gales' heirs v. Miller*, 3 Monroe, 418, it was decided by the Supreme Court of Kentucky, as early as 1826, that the forfeiture did not occur upon a *sale* by a second husband, in the State, nor in case of removal of the slave by the *purchaser* from the State, confining the act to the case of *removal* of the property by the husband or wife beyond the State. 1 Monroe & Harlan's Dig., 518. So, according to that case, the complainants had no action until the death of their mother. There is some question made in the proof and argument as to whether Galloway purchased the negro from the husband, and took her to Alabama as his own, or acted only as agent. But if the latter be the character in which he acted, the case falls within the act, and a right to sue accrued to the reversioners at that time. But we find in further construction of their act in such a case as that, the Kentucky Courts have held, that though the tenant for life may forfeit his right, the remainderman is not bound to urge the forfeiture, and time will not commence to run to the prejudice of his right until the life estate terminates." Same Dig., 520, § 27, citing *King v. Minis*, 7 Dana., 273; *Tom Davis v. Tingle*, 8 B. Monroe. These cases have not been furnished, but we suppose the principle to be correctly extracted in the Digest. Then, in neither aspect would

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the forbearance affect the right of the complainants to recover in this suit.

We are brought then, irresistibly to the conclusion that the statute of limitation is not in the way of a recovery by complainants.

The decree will be reversed, and a decree here against the defendants for the slaves.

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WILL. *Issue of devisavit vel non. Effect of affirmance, in the Supreme Court, by agreement.* A suit to test the validity of a will is a proceeding *in rem*, and binding upon all the parties in interest, whether parties to the issue or not. And this is so, if there is an affirmance of the judgment of the Court below, by the Supreme Court, upon the agreement of the parties to the issue, provided said agreement is not fraudulent.

FROM FRANKLIN.

This cause was heard at the November Term, 1858, before Chancellor RIDLEY, who pronounced a decree for the defendants. The complainant appealed.

HICKERSON and COLYAR, for the complainant.

E. A. KEEBLE and ESTILL, for the defendants

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PETER TURNEY, for the defendants, said :

A judgment, decree or verdict, is allowed to operate as evidence against strangers to the original suit, when the proceeding is, as it is technically called, *in rem*, as upon marriages, matters testamentary, &c. 1 Starkie on Evidence, top page, 227-8.

A suit to establish the validity of a will, is a proceeding *in rem*; all persons interested, for or against the will, have a right to be made parties, and the judgment binds all persons, whether parties to the record or not. *Patton v. Allison*, 7 Hum., 320.

There is nothing that requires so little solemnity, said Lord Hardwicke, as the making of a will of personal estate, according to the ecclesiastical law, for there is scarcely any paper writing which they will not admit as such. It may be considered as a settled point, that the form of a paper does not affect its title to probate; provided it is the intention of the deceased that it should operate after his death: thus a deed poll, or an indenture, a deed of gift, a bond, a marriage settlement, letters, drafts on bankers, &c., &c., have been held to be testamentary papers. 1 Williams on Ex'rs, 8d Am. Ed., p. 85, 86; *McLean v. McLean*, 6 Hum., 452.

The true principle to be deduced from the authorities appears to be, that if there is proof, either in the paper itself, or from clear evidence, *dehors*—

1st. That it was the intention of the writer of the paper to convey the benefit by the instrument, which would be conveyed by it, if considered as a will:

2d. That death was the event that was to give-

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effect to it, then whatever be its form, it may be admitted to probate as testamentary. 1 Williams on Ex'rs, 86.

If the instrument be equivocal or silent, it may be proved by extrinsic circumstances, to have been intended to operate as a testamentary disposition.

A paper of a date prior to a will with a revocatory clause, may be admitted to probate, provided the Court be satisfied that it was not the intention of the testator to revoke that particular legacy or benefit; thus when there was a letter to the executors, directing the payment of a legacy, and a clause of revocation in a subsequent will, it was held, that the legacy was not revoked by a general revocatory clause. So in *Gladstone v. Tempest*, checks written in 1833, by the deceased, on his banker, but not intended to take effect until after his death, were pronounced for as part of the testamentary disposition of the deceased, notwithstanding he had in 1834, formally executed a will disposing of the whole of his property, and containing a full clause of revocation. 1 Williams on Ex'rs, p. 132-3.

CARUTHERS, J., delivered the opinion of the Court.

James Taylor, Sr., made his will, and died in Franklin county, in 1839, in which he gave to his daughter, Polly, complainant's intestate, and her sisters, Elizabeth and Patsy, and his son, Alden, after giving his wife what he had received by her at marriage, most of his personal estate, except the slaves and some real estate,

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which he had attempted to dispose of by deeds, to other children. The balance, after settling up the estate, is now in the hands of defendant, Wm. Taylor, acting executor. The portion of the same to which complainant's intestate is entitled, is found to be about \$103, by the report and decree. The complainant claims a much larger amount, and has appealed to this Court from the decree.

The questions made arise upon this state of facts:

1. On the 23d of October, 1834, the testator, James Taylor, Sr., made a deed of gift to his son James, of five slaves.

2. A deed of gift was made to Samuel Taylor at the same time, for other slaves.

3. On the 2d of March, 1838, he made a gift, but in the form of a bill of sale, of sundry slaves, to his son William.

4. On the same day, he made a deed for a tract of land, to his son Alden.

The three last deeds were signed and witnessed, but retained in his own possession, without delivery, until his death, and after that were proved and registered.

In a contest for the property, it was decided that they were invalid as deeds, for want of delivery, and conferred no title upon the parties in that character. 2 Hum., 597.

At the March Term, 1842, of the County Court of Franklin county, Wm. Taylor, as acting executor of James Taylor, Sr., deceased, presented for probate as parts of the will of his testator, the said three papers. This was opposed by Martha Taylor and Elizabeth

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Dowe, two of the daughters of said James, Sr., deceased. And an issue of *devisavit vel non*, was regularly made up in the Circuit Court of Franklin, upon said papers.

At the March Term, 1848, the issue was tried, and the papers established as parts of the will of said James Taylor, Sr., deceased. From this judgment there was an appeal to the Supreme Court.

At the December Term, 1845, of the Supreme Court, the judgment was affirmed by *agreement* of the parties, and the judgment of affirmance regularly entered.

So the case rested until the filing of this bill in November, 1856, by the complainant, a citizen of the State of Missouri, under a recent appointment by the County Court of Franklin, as administrator of Polly Cain, deceased. The complainant states that the said Polly died in Roane county, in 1840, leaving only one child, named Pelina, with whom he has since intermarried. He claims one full share of the estate, not only that embraced in the will of James Taylor, Sr., but that which he attempted to dispose of by the said three papers, in the form of deeds, but set up as before stated, as testamentary. He insists that he is not bound by the judgment of the Court in favor of the plaintiff, in the issue and verdict of the jury upon said papers.

There can be no controversy now, but that the proceeding to prove a will in solemn form, is, *in rem*, and is binding upon all others, as well as the parties to the issue. *Patton v. Allison*, 7 Hum., 320. That being so, we are relieved from the consideration of the perplexing questions presented in the argument, as to the true character of the these papers. Whether they are

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testamentary or not, is a question not now open for inquiry, having been once closed by the proper authorities, or judicial determination.

But it is contended, that none but the parties on record, are bound by the adjudication in that case, because the final judgment of affirmance in the Supreme Court was by agreement of the parties, and not the determination of the Court.

We are referred to no authority recognizing this distinction, and we cannot see its force. If the agreement were fraudulent, as is intimated in the bill, that might be a different case. But there is no ground for this imputation. We are authorized to believe that the contestants despairing of being able to reverse the judgment of the Circuit Court, concluded to make no further resistance, and agreed to an affirmance. This is often the case, and should be, more frequently, where attorneys can find no ground to base a plausible argument upon, for a reversal. One main reason for the conclusive character of the judgment in these cases, is, that all the parties interested have a right to become parties, and failing to do so, they are equally bound by the decision.

It is not for those who stand off, and keep clear of the dangers of the contest, to complain that the battle was not fought hard, or long enough, or that the surrender was premature. The final judgment is in conformity with that of the Circuit Court, and is presumed to be correct. But whether it is or not, it ended the controversy in favor of the papers as testamentary, and is conclusive upon all the world.

Again, the appeal did not abrogate, but only suspended the judgment of the Circuit Court. 10 Hum.,

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822. A dismissal of the appeal would have left the judgment in full force; an affirmance, even by consent, could not do less.

There is no doubt that the old man considered that he was making a valid disposition of his property to his sons, by said papers, and that the only effect upon the title, of withholding the possession until his death, would be to postpone their right until that time, and "keep the staff in his own hand while he lived," as he expressed it. But still, it is true, he considered the papers deeds, and not wills, or parts of his will. Yet the form is nothing, if, in substance, the papers are testamentary in their nature; that is, if it appears clear that it was the intention of the deceased, that the instruments could operate to convey the property, not before, but after his death. 1 Williams on Ex., 85. The case of *Walls' Adm'r, v. Ward*, 2 Swan, 650, does not contravene this principle. There a deed of gift made perfect by delivery, was executed and registered, for the slaves, and a life estate reserved. A vested remainder, a present interest passed to the donee. If the deed had not been delivered, no title would have vested, and then it would have been analogous to this case. But as before stated, all these questions are closed by the probate in solemn form, and are now beyond our reach.

The Chancellor's decree will be affirmed.

Mary Towles v. John W. Towles *et al.*

MARY TOWLES v. JOHN W. TOWLES *et al.*

ADMINISTRATION. *Debt due from an heir. Assignment of interest.* If an heir of an estate is indebted to the deceased in a sum which can not otherwise be made, the administrator, by proper proceedings, may subject the interest of such heir in the real estate, to the payment of said indebtedness. But if said heir has *bona fide* transferred his interest in the estate to an innocent party, the debt not being a lien upon such interest, it can not be subjected to the satisfaction of said indebtedness.

FROM WARREN.

This cause was heard at the September Term, 1858, before Chancellor RIDLEY. The defendants appealed.

R. J. MEIGS, for the complainant.

F. B. FOGG, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

Oliver Towles died intestate, on the 8th of March, 1856, leaving the complainant his widow, and no children. His estate consisted of four or five slaves, an inconsiderable personal estate besides, and a valuable tract of land near McMinnville, in Warren county, Tennessee. The personal estate, exclusive of the slaves, will fall short of paying the debts by a large amount—enough to take the proceeds of most of the slaves, and a petition is now pending by the administrator, John W.,

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to sell them for that purpose. So it is doubtful whether any thing will be left of the personal estate for the widow after settling up the *debts*. There are six heirs at law of the said Oliver, deceased, among whom is James Towles, who is entitled to one-sixth of the real estate. That has been sold in the Chancery Court at McMinnville, and the proceeds, amounting to about one thousand dollars, are now in the hands of the clerk and master.

James Towles is a debtor to the estate to the extent of about \$300, for which there is a judgment in favor of the administrator, on the 9th of June, 1857, which cannot be collected, as he is insolvent, and the execution returned *no property found*, the 27th of June, 1857. Now this petition was filed the 23d of March, 1857, by the widow, in the proceeding in the Chancery Court at McMinnville, for the sale of the land, in which she is a party, for the purpose of compelling the application of so much of the one-sixth of the land proceeds to which James is entitled, as heir to his brother, to the discharge of the said debt against him. The administrator, in his answer, concurs in the prayer of the petition, if it can be legally granted.

The difficulty presented is, that soon after the death of his brother, and before any proceeding was instituted to collect said debt, or sell the land, viz, the 17th of April, 1856, James sold and conveyed all his interest in the land to Arthur Towles and P. G. Swinney, for \$778. At least that is the consideration expressed in the deed, which was registered in Warren county, on the day of its execution, the 17th of April, 1856.

These purchasers were not parties to the proceeding

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for the sale of the land for partition; but came in by petition after the application of Mary Towles for the appropriation of the fund before stated, and by their said petition, and their answer to hers, set up their right and title to all the interest of James, in the fund, by virtue of their purchase and deed from him.

It is a little remarkable that they do not state what or how they paid James for this hasty conveyance made so soon after his brother's death, but content themselves with barely referring to the consideration stated in the deed, without showing that it was for money paid, a subsisting indebtedness, upon credit, or for other property. But it may be answered, that as there were no charges against them in her petition, they were not called upon to answer as to that matter, but it was enough to exhibit and stand upon their deed. This is so, but it would have been more satisfactory to have had some account of the particulars of the contract.

This is a question of some importance to Mrs. Towles, as the loss of this debt will throw an additional burthen, to that extent, upon her slaves in the payment of the debts against the estate. And to that extent, of course, her distributive interest, being all the personalty remaining after the discharge of the debts, will be diminished. There would be no doubt of the right of the administrator to have this debt of \$800, against James, paid out of his one-sixth of the proceeds of the land, if the right to it still remained in him. But although anxious to find some principle or authority to authorize it, we are not able to see how this debt to the estate could interpose any obstacles in the way of selling his interest in the land which had descended to

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him as an heir of his brother. It was certainly no lien upon it, as it was not reduced to a judgment.

There was no question as to a collation of advancements, for it was not a case where that doctrine could apply. It is simply a case of indebtedness to the estate by a collateral heir, who is unable to pay except out of the lands descended to him, and he makes a disposition of that before it is, by any legal rule, bound for the debt.

A very plausible argument is made to the effect, that, as by the law this debt, as well as the other personalty, goes to the widow, and the land to the heirs, the debtor should be bound to make it good before he can claim his inheritance from the same source. Or, that inasmuch as Oliver Towles was largely indebted, and that the slaves have to be sold to pay these debts, it would be inequitable to allow James to convey away the real estate descended to him, and, by avoiding the payment of his debt to the estate, throw that much more weight upon the widow's slaves. This would all be very palpable if it were not for the fact that the rights of purchasers have intervened before any steps to fix this debt upon, or in any way bind the land, were taken.

The widow, on failure of children, is much favored by our recent statute, making her sole distributee, and excluding all the next of kin from any participation in the personalty, no matter how much it may be. But this must be after the settlement of the estate by discharging all debts and expenses of administration. This great change in her favor as to the personalty, leaves unimpaired her dower in the realty.

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If, however, these persons are not innocent purchasers, but obtained the conveyance without a fair consideration, or to enable James to avoid this debt, even upon full consideration, then their purchase and deed would interpose no difficulty in the way of an application by the administrator to subject the fund to this debt.

The consideration seems, as it has turned out, to be inadequate, but not to the extent to prove fraud of itself. But that circumstance, together with the time of the deed, so soon after the death, and the silence of the purchasers in their petition and answer as to the *bona fides* of their purchase, or the facts attending it, make out a proper case for further examination, if the parties desire it. The case will, therefore, be remanded, if the widow and administrator wish it, for the purpose of instituting an inquiry, by proper pleadings, to investigate the transaction further. As the administrator is the creditor, it would seem that the petition should be by him, although it is the interest of the widow which is at stake.

The Chancellor having allowed the claim, the decree must be reversed, and the cause remanded.

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CORNELIUS FARRIS v. JAMES G. CAPERTON *et al.*

FRAUDS. *Statute of. Division of lands belonging to partners.* If lands belong to parties as a firm, and are described in the deeds for them, nothing more is required in a division between the partners, than to designate the tracts assigned to each by such terms as will be understood, or the general appellations by which the different tracts of land are known. Such an agreement is not within the principle requiring the particulars of the contract to be set forth in writing.

FROM FRANKLIN.

This cause was heard before Chancellor RIDLEY, who pronounced a decree in favor of the complainant. The defendants appealed.

ESTILL and FRANCIS, for the complainant.

A. S. COLYAR, for the defendants.

CARUTHERS, J., delivered the opinion of the Court.

Complainant and John Fitzpatrick, defendant's intestate, were partners for several years in a saw and grist mill. In December, 1853, they made an agreement in the settlement of their affairs, which was reduced to writing. After this, in March, 1854, they made a reference to arbitrators of all matters in controversy between them, *at that time*, by whom an award and final settlement was made, which, it is said, was satisfactory, and the parties acquiesced in it. It seems

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that the difficulty which produced this suit arose out of the construction of the award and settlement, as to their extent and effect.

The settlement of 1853 is signed by the parties and attested by two witnesses, and is thus briefly stated by them: "We find, upon a full settlement, that Farris is indebted to said firm \$2,802.81, and that Fitzpatrick is not indebted to said firm. Said Fitzpatrick takes the tracts of land known as the 'Peter tract,' and another known as the 'Riley tract,' and said Farris is to have the 'mill place,' upon paying Fitzpatrick \$1,485.40."

Each party took possession accordingly. The deeds for all these lands had been made to Fitzpatrick individually; but it is admitted on all hands that they were paid for out of the firm means, and consequently were partnership property.

It seems that the parties were not satisfied with their settlement of 1853, and, in March, 1854, submitted their accounts to four competent friends to review, and finally adjust them. This was done upon a laborious examination, and the result was, as stated in writing, that Farris, instead of being indebted to the firm \$2,802, as supposed in their previous settlement, only owed it \$12.62, which was then paid. Upon this award the parties say in writing on the same day: "We, the undersigned agree to the settlement of which the within is a condensed statement, as a final conclusion of our old partnership. March 5, 1854."

It is proved that the matter of the division of the land was not brought before these referees, as that was not understood to be in question, having been previously divided by the parties, but only their accounts

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were in dispute. There can be no doubt but that such was the understanding of the parties; that they were content with the division they had made, but only differed about their partnership dealings and accounts, which alone were submitted to the arbitrators.

Very soon after this, Fitzpatrick instituted his action of ejectment against Farris, upon his legal title. To perpetually enjoin that action, and compel Fitzpatrick to make him a title, under their agreement in writing of December, 1853, as to the division of their partnership lands, this bill was filed.

Can the object and prayer of his bill, upon the facts we have stated, be resisted? The Chancellor thought not, and so do we.

The objections of the defendant are all untenable:

1. The argument is unsound, that, under the statute of frauds, as expounded in the case of *Sheid v. Stamps*, 2 Sneed, 172, and the authorities there cited, in relation to the necessity of setting forth in the writing the particulars of the contract, would render this writing void. That doctrine does not apply to a case like this. Here the lands belonged to the parties as a firm, and were well described in the deeds, and nothing more was required in a division between themselves, but to designate the tracts assigned to each, by such terms as would be well understood, or the general appellations by which they were known. The "Peter tract," the "Riley tract," and the "mill tract" were sufficient. If any uncertainty or ambiguity existed, it could be easily explained by parol. If there were two mill tracts, proof would be required to ascertain which was meant. But

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here there was but the one "mill tract" owned by the firm, and there is no uncertainty.

2. The \$1,480 to be paid by Farris was no part of the consideration, nor a condition to the transfer of that tract. It is manifest from the circumstances, that the division of the lands had no connection with that matter. By the mistake of the parties, it was then supposed that Farris was indebted to the firm \$2,800, to the half of which Fitzpatrick was entitled, and that was stated in connection with the partition of their lands; and it may be that the latter intended, in this way, to secure a lien upon the half of the land assigned to the former for its payment, and that would be unobjectionable, if such was the object, and it was properly done. But then it turned out afterwards, by the award of the arbitrators, that this was all a mistake, and that nothing at all was due from Farris to his partner. This, certainly, removed all difficulty on that point, and left the title to the mill tract unincumbered under the previous written agreement.

It appears that Fitzpatrick was a professional man, of information and experience, and his partner a laborious, uninformed man. They were unequal in this respect, and it is not surprising that such mistakes, as might occur in the case, would, most probably, be against Farris. This may account for the very great difference in the result, when their complicated accounts were placed in the hands of competent men for adjustment.

We think justice has been done by the Chancellor, and affirm his decree making the injunction perpetual and vesting the title to the mill tract in Farris.

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DANIEL WHIRLEY v. W. S. WHITEMAN et al.

1. **STATUTE OF LIMITATIONS.** *Infancy. Injuries to the person.* A party who has received an injury during minority may sue by *prochein ami* at any time during his infancy; or, he may decline doing so, and bring his suit within one year after arriving at age. His delay for a period of eighteen years to bring suit, though a matter, if not accounted for, proper to be taken into consideration by the jury in estimating the damages, can have no influence upon the question, as to his right to maintain the action.
2. **CIRCUIT COURT.** *Charge to the jury.* In trials by jury, the Court is to decide questions of law, and the jury, questions of fact. What are called mixed questions, consisting of both law and fact, as questions in respect to the degree of care, skill, diligence, &c., required by law in particular cases, are to be submitted to the jury under proper instructions from the Court, as to the rules and principles of law by which they are to be governed in their determination of the case. The principles of law by which the jury must be governed in finding a verdict, cannot be left to their arbitrary determination. They must be settled by the Court, and this may be done in one of two modes; either the Court must inform the jury, hypothetically, whether or not the facts which the evidence tends to prove will, if established in the opinion of the jury, satisfy the allegations in the pleadings; or, the jury must find the facts specially, and then the Court will apply the law, and pronounce whether or not the facts so found are sufficient to support the averments of the parties.
3. **NEGLIGENCE.** *Liability for. Criterion for determining.* According to the maxim of the common law, *sic utere tuo ut alienum non laedas*, every person is responsible in law for the consequences of his own negligence, and the proper criterion for determining his liability is, whether he has been guilty of gross negligence, viewing his conduct with reference to the caution which a prudent man would, under the given circumstances, have observed.
4. **SAME.** *Negligence of the party injured. Mutual negligence.* In general, if a party by his own gross negligence, brings an injury upon himself, or contributes to such injury, he cannot recover therefor. Nor, in cases of mutual negligence, where the parties are equally blameable, can there be a recovery.
5. **SAME.** *Same. Qualification of the principle.* An important and well established qualification of this principle is, that the mere want of a

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superior degree of care or diligence, cannot be set up as a bar to the plaintiff's claim for redress, and that although the plaintiff may himself have been guilty of negligence, yet, unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he will be entitled to recover. He is considered the author of the injury, by whose first or more gross negligence it has been effected.

6. *SAME. Further qualification of the principle.* The doctrine of negligence has been carried further in one class of cases, and to the extent, that even wilful misconduct on the part of the plaintiff, will not necessarily exclude him from the right to sue. As in cases where spring guns and dangerous instruments have been set upon one's own ground, for the protection of his property; and persons without notice, by trespassing on the grounds, have been seriously injured.

FROM DAVIDSON.

This cause was tried at the May Term, 1858, before Judge BAXTER. The jury returned a verdict in favor of the defendants, and the plaintiff's motion for a new trial having been overruled, he appealed.

R. J. MEIGS, for the plaintiff, cited *Lynch v. Nurdin*, 41 Eng. Con. Law R., 422; *Dixon v. Bell*, 5 Maule & Selw., 198; *Neal v. Gillett*, 23 Conn. R., 437; *Trow v. Vermont C. R. R.*, 24 Vermont R., 187; Redfield on Railways, ch. 17, § 2, p. 329; *Hartfield v. Roper*, 21 Wend., 615, and commentary on it in 22 Vermont R., 225; Broom's Maxims, 161; 2 Stark. Ev., 532; 3 Camp.; 26 Pa. R., 118; 27 Pa. R., 183; *Childress v. Yourie*, Meig's R., 561-564. 4, 57}

TRIMBLE, A. EWING and McEWEN, for the defendants.

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MICHAEL VAUGHAN, for the defendants, argued :

1st. The business in which the defendants were engaged being lawful, they are held only to that degree of diligence and care, in conducting their business, or to that degree of skill in constructing their machinery, which a man of common prudence and skill would have exercised under the like circumstances.

2d. In ascertaining the degree of diligence required by the defendants we must look to all the circumstances connected with the accident, the time, the place, the number of persons living in the vicinity of the mill or place of accident, the habits of the defendants as prudent and careful men, &c. One witness states, that in 1838 there was but one house near the mill of the defendants; now that portion of the town is densely populated; and that degree of care which would have enabled the defendants to run their machinery, in 1838, with safety, might, at this period, under the great change of circumstances, be deemed negligence.

3d. The mother of the plaintiff was guilty of gross negligence, in permitting a child of three years of age, and not capable of observing and avoiding accidents, to be in a mill which was run by dangerous and heavy machinery.

4th. No recovery can be had against the defendants, unless they were *grossly negligent*, or the injury was voluntary on their part.

5th. What is reasonable skill, proper care and diligence, &c., can only be determined *as a matter of fact by the jury*. It is impossible to establish any general rule upon so indefinite a subject; and it is impossible

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to make juries, or merely practical men anywhere, determine these matters, except upon the circumstances of each particular case. *Robinson v. Cone*, 22 Vermont, 225.

6th. In the case of *Hartfield v. Roper*, 21 Wend. p. 615, the doctrine is established, that when a child, even of such tender years as not to be capable of using sufficient discretion to avoid danger, is permitted to be unattended in the highway, and is there injured by a traveler, he cannot recover, either in an action of trespass or case, unless the defendants have been guilty of *gross negligence*.

"The true rule is, that the parent or guardian is responsible for the exercise of ordinary care and prudence, until the infant arrive at years of discretion sufficient to enable him to exercise ordinary care and prudence for himself." *Brown v. Maxwell*, 6 Hill, 592.

7th. The cases upon this subject, seem to have turned upon the question of prudence or negligence upon the part of the defendant, as determined or found by the jury. The case of *Lynch v. Nurdin*, 1 Ad. and E. N. S., 28, was decided upon the ground, that the defendant had been guilty of *gross negligence*; and in *Robinson v. Cone*, in 22 Vermont Reports, page 224, (which cases seem to conflict with the one above cited,) the Court held the following: "Here the jury have found that the plaintiff was properly suffered by his parents to attend school at the age and in the manner he did, and that the injury happened through the ordinary neglect of the defendant; or if not properly suffered to go to school, then, that the defendant was guilty of *gross neglect*; for the Judge put

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the case in the alternative *to the jury*, and they have found a general verdict for the plaintiff."

McKINNEY, J., delivered the opinion of the Court.

This was an action on the case, to recover damages for an injury to the person of the plaintiff, whereby he was dismembered of a limb; verdict and judgment were rendered for the defendants. The injury was received in the year 1838, when the plaintiff was an infant of but little more than three years of age; and in 1856, shortly after arriving at full age, he brought this action.

The injury occurred in this way: The defendants were owners of a paper-mill in Nashville, on Water street, on the bank of Cumberland river, the machinery of which was propelled by steam. Connected with the mill, machinery had been constructed to draw up wood from the river, on a truck. This consisted of a shaft, proceeding from the engine room of the mill, and extending through the wall of the mill-house. On the end of this shaft, and outside of the wall, some eight or ten inches, was fixed a cog-wheel, about twenty-six inches in diameter, which was geared into another cog-wheel, for the purpose of moving the truck. The wheels revolved from ten to twenty inches from the ground, and worked upwards and outwards. They were about twenty feet from the street, in an open space, entirely exposed without any cover, guard, or enclosure whatever.

The plaintiff's mother lived on the other side of

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Water street, nearly opposite the paper-mill. These wheels were applied to other purposes than running the truck, and were generally in motion. In the fall of 1838, at a time when the engineer and most of the other hands were absent at dinner, leaving the wheels running, the plaintiff was caught by them, and thrown behind the wheel next to the wall, and his right leg was crushed between the knee and ankle, so that it remained attached only by a portion of the muscle and skin, and had of necessity to be amputated.

The proof shows that the wheels might have been boxed at a very trifling expense; or an enclosure made around them, so as to have been secured against the possibility of injury to any one. The proof likewise shows, that the "plaintiff, and other children played about the mill almost every day." It is proved that the defendant, Whiteman, who had the sole management of the establishment, and who was generally at the mill, was a careful, prudent man. Several of the defendant's witnesses were of opinion, that there was no necessity for boxing or enclosing the wheels; that there was no reasonable ground to apprehend danger from leaving them exposed, so near to the street, as no one could be injured by the wheels, unless in getting underneath them. It is also shown, that the neighborhood around the mill, at that time, was very sparsely populated.

The foregoing is the substance of the proof. The Court instructed the jury, "That they should look to all the facts of the case; the locality and character of the machinery exposed; the manner of using it; its liability to do mischief, &c.; and ask themselves the

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question, whether, in their opinion, a man of ordinary sense, prudence and diligence, having a proper regard for the safety of others, would have been content to leave the machinery exposed as it was, at the place it was, without apprehension of danger therefrom."

For the plaintiff, it is insisted, that the instruction given to the jury was improper; and that the verdict was contrary both to the law and evidence.

It may be proper to remark at the outset, that the delay of the plaintiff, for a period of some eighteen years, to bring suit for the injury received, though a matter, if not satisfactorily accounted for, proper to be taken into consideration by the jury, in estimating the damages, can have no influence upon the question, as to his right to maintain the action. The plaintiff might have sued by *prochein ami*, at any time during minority; or, he might decline doing so, and bring his suit at any time within one year after arriving at age, as he elected to do.

The objection to the charge is, that it leaves the determination of the law, as well as the facts of the case, to the jury.

) In trials by jury, the Court is to decide questions of law; and the jury, questions of fact; what are called mixed questions, consisting of both law and fact, as questions in respect to the degree of care, skill, diligence, &c., required by law in particular cases, are to be submitted to the jury, under proper instructions from the Court, as to the rules and principles of law by which they are to be governed in their determination of the case. The truth of the facts and circumstances offered in evidence, in support of the allegations on the record,

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must be determined by the jury. But it is for the Court to decide, whether or not those facts and circumstances, if found by the jury to be true, are sufficient, in point of law, to maintain the allegations in the pleadings. And this must be done in one of two modes; either the Court must inform the jury, hypothetically, whether or not the facts which the evidence tends to prove, will, if established in the opinion of the jury, satisfy the allegations; or, the jury must find the facts specially, and then the Court will apply the law, and pronounce whether or not the facts so found are sufficient to support the averments of the parties. 1 Starkie's Ev., 447. The principles of law by which the jury must be governed in finding a verdict, cannot be left to their arbitrary determination. The rights of parties must be decided according to the established law of the land, as declared by the Legislature, or expounded by the Courts, and not according to what the jury, in their own opinion, may suppose the law is, or ought to be. Otherwise, the law would be as fluctuating and uncertain as the diverse views and opinions of different juries in regard to it. In this view, we think, the charge is justly exceptionable.

We are of opinion, likewise, that the verdict is against the evidence. According to the maxim of the common law, *sic utere tuo ut alienum non lædas*, every person is responsible in law for the consequences of his own negligence. Broom's Legal Maxims, (Am. ed. of 1854,) 253. And the proper criterion for determining the liability of the party is, whether he has been guilty of gross negligence, viewing his conduct with reference to the caution which a prudent man would, under the

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given circumstances, have observed. *Ib.* Where a person uses his own property carelessly and negligently, and without a reasonable degree of care and caution not to injure others, where injury is likely to ensue, he is not only civilly, but, in some cases, criminally responsible for the consequences. And this upon the principle, that a gross disregard of the interests of others is not distinguishable, either in point of moral guilt, or evil results, from a malicious intention to injure. 2 Starkie's Ev., 526. The cases in support of this general doctrine are very numerous. In *Coupland v. Hardingham*, 8 Campb., N. P., 398, which was an action on the case for negligence in not railing or guarding an area in front of defendant's house; and the plaintiff, passing by at night, fell into it, and had his arm broken. The defence was, that the premises had been in that condition for many years before the defendant went into possession of them. But Lord Ellenborough held, that the defendant, as soon as he took possession, was bound to guard against the danger to which the public had been before exposed, and that he was liable for the consequences of having neglected to do so; that the area belonged to the house, and it was a duty which the law cast upon the occupier of the house to render it secure. The books are full of cases in support of this general principle.

In the argument for the defendants, the applicability of this doctrine to the case under consideration, rather than its correctness, is controverted. The ground of defence is, that the injury was occasioned, not by any negligence or want of proper care on the part of the defendants, but solely by the gross negligence and wilful misconduct of the plaintiff himself, who was a trespasser

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on defendant's property, and whose own wrongful act was the immediate cause of the injury.

It is certainly true, in general, that if a party, by his own gross negligence, brings an injury upon himself, or contributes to such injury, he cannot recover; for, if by ordinary care and prudence he might have avoided it, he must be regarded as the author of his own misfortune. But an important and well established qualification of this principle is, that the mere want of a *superior* degree of care or diligence cannot be set up as a bar to the plaintiff's claim for redress; and that although the plaintiff may himself have been guilty of negligence, yet unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he will be entitled to recover. *Lynch v. Nurdin*, 1 Ad. & Ellis N. S., 29; Eng. C. L. R., vol. 41, p. 422; 3 M. & W., 248; 22 Vermont R., 214. It is likewise true, that in cases of mutual negligence, where the parties are equally blameable, there can be no recovery.

The case of *Hartfield v. Roper*, 21 Wendell's R., 615, is relied on by the defendant's counsel to establish the proposition, that an infant of tender years, who has received an injury by his own gross negligence, which might have been avoided by ordinary care, is as much precluded from a recovery as an adult. That case does decide, where a child of such tender age (two years old) as not to possess sufficient discretion to avoid danger, is permitted by his parents to be in a public highway, without any one to take care of him, and is there run over by a traveller and injured, there can be no recovery, unless the injury was voluntary, or was

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owing to culpable negligence on the part of the defendant. The principle announced is, that though the child be incapable of the exercise of ordinary care himself, yet he is chargeable with the want of such care on the part of his parents, whose duty it was to guard him from exposure to danger until he should become capable of taking care of himself.

This decision is no less opposed to the current of authority upon the point, than to every principle of reason and justice. It is, literally, to visit the transgression of the parent upon the child.

Lord Denman lays it down in *Lynch v. Nurdin*, above cited, that "ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation." To exact of the plaintiff a degree of caution and prudence, which he could not possibly be possessed of, would be an absurdity. In *Lynch v. Nurdin*, the facts briefly were, that the defendant's servant negligently left his horse and cart in the street, with no one to take care of them. Plaintiff, a child seven years of age, got upon the cart in play; another child led the horse on, and the plaintiff in getting off, fell and was run over, and had his leg broken. It was held, that plaintiff was entitled to recover, notwithstanding that, by his positive wrong in getting upon the cart, he was the co-operating cause of his own misfortune, Lord Denman was of opinion, that no greater degree of care was to be required of him than was compatible with his age and capacity; and that if, in getting on the cart, he merely indulged the natural instinct of a child, in amusing himself with the empty cart, the defendant could not avail himself of that fact; that as

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the most blameable carelessness of the servant tempted the child, he was the real and only cause of the mischief.

So in *Illidge v. Goodwin*, 5 C. & P., 190, the defendant's cart and horse were left in the street unattended, and a person passing by whipped the horse, and caused him to back the cart against the plaintiff's window, it was held that the defendant was liable. Tindal, C. J., said, "If a man chooses to leave a cart standing in the street, he must take the risk of any mischief that may be done;" and that the wrongful act of the person in whipping the horse was no defence. In *Dixon v. Bell*, 2 M. & S., 198, the defendant sent a servant girl, thirteen years of age, to bring a loaded gun, with direction to the person in whose possession it was, to take out the priming, which he did; and the girl, in play, pointed the gun at plaintiff's son, a child of some eight or nine years of age, and, drawing the trigger, it went off and injured the child. Lord Ellenborough held, that by the defendant's neglect to discharge the gun, he had left it in a state capable of doing mischief; and the law, therefore, held him responsible. In *Robinson v. Cone*, 22 Vermont Rep., 214, a child of less than four years of age was amusing himself sliding down a hill in the public highway; the defendant was driving a sleigh rapidly down the hill, and the plaintiff's left leg was caught by one of the runners of the sleigh, and fractured so as to require amputation. In answer to the argument, that the injury to the plaintiff was caused by his own negligence and wrong, the Court said, that although a child of tender years be in the highway, through the fault or negligence of his parents, and so

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be improperly there, yet if he be injured through the negligence of the defendant, he is not precluded from redress; that, in such case, the defendant is bound to a proportionate degree of watchfulness; and what would be but ordinary neglect in regard to one whom the defendant supposed a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger. *Bass v. Litton*, 5 C. & P., 407. And that a child of tender years is not bound to the same rule of care and diligence in avoiding the consequence of the neglect of others, which is required of persons of full age. That all that is demanded in such cases, is a degree of care or diligence equal to the capacity of the child. So, where the defendant had a gate upon his own land, through which the plaintiff, a child of six or seven years, and other children, were accustomed to pass; and the plaintiff in passing, without license, shook the gate, and it fell upon him and broke his leg; the defendant was held liable. 19 Conn. R., 507.

These cases rest upon the principle, that the law imposes restrictions upon every one, as well in the use and enjoyment of his property, as in his personal actions and conduct; and that, though a man do a lawful thing, yet if any damage thereby befalls another, he shall be answerable, if he might have avoided it. *Broom's Legal Maxims*, 248.

The doctrine of these cases is not in conflict with the general principle, that a person shall not recover for an injury brought upon himself by his own want of reasonable care and prudence, or which his want of ordinary care contributed to produce, or where the parties must

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be viewed as equally culpable. It is but a qualification of the principle, founded upon a just distinction. } Both parties may be in fault, in omitting the exercise of proper diligence; but not equally so, either as respects the degree of negligence, or the capacity, mental or physical, to have prevented or escaped the injury. And, therefore, he shall be considered the author of the mischief by whose first or more gross negligence it has been effected. }

The doctrine has been carried further in one class of cases, and to the extent that even wilful misconduct, on the part of the plaintiff, will not necessarily exclude him from the right to sue. As in cases where spring-guns and dangerous instruments have been set upon one's own ground for the protection of his property; and persons, without notice, by trespassing on the grounds, have been seriously injured. The case of *Bird v. Halbrook*, 4 Bing., 628, is an illustration of the application of the doctrine. In that case the defendant set a spring-gun, without notice, in a walled garden at a distance from his house, for the protection of his property, some of which had been stolen; and the plaintiff, who climbed over the wall in pursuit of a stray fowl, having been shot and seriously injured, the defendant was held liable.

But it is unnecessary to refer to other cases upon this subject. We feel clear, upon the facts proved in this record, that the defendants were guilty of negligence—perhaps it might be said of gross negligence—in leaving the machinery so exposed as that, by possibility, it might be the cause of injury to others. And neither the negligence of the parent, in suffering the child to play about the mill, nor the supposed wrongful

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act of the plaintiff himself, in trespassing upon the defendant's property, can excuse them from liability. In playing about the cog-wheels, the plaintiff was "but indulging the natural instinct of a child;" but yielding to the temptation into which he was led by the negligence of the defendants.

And we think it was the duty of the Court to have instructed the jury specifically, as a matter of law, that the facts stated, if true, constituted that degree of negligence which would render the defendants liable in damages.

Judgment reversed.

C. W. NANCE v. DAVID B. HICKS.

1. *CERTIORARI AND SUPERSEDEAS. Granted in open Court.* It is in time, if the application for writs of *certiorari* and *supersedeas* is made in open Court, at the next term after the rendition of the justice's judgment, and a sufficient legal reason shown for not appealing.
2. *SAME. Counter affidavits.* Upon a motion to dismiss a petition for writs of *certiorari* and *supersedeas*, counter affidavits, controverting the truth of its statements, are not admissible.

FROM DAVIDSON.

At the September Term, 1858, BAXTER, J., presiding, the petition of Nance was dismissed, He appealed.

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WOODS and MERRITT, for the plaintiff.

REID, for the defendant.

WRIGHT, J., delivered the opinion of the Court.

The judgment of the Circuit Court in this cause is erroneous and must be reversed.

The petition of Nance for writs of *certiorari* and *supersedeas*, contained a sufficient cause for their issuance.

It showed that the judgment of the justice of the peace was unjust, and gave a sufficient legal reason for not appealing.

The application was made in open Court for the issuance of the writs, during the term of the Circuit Court, which sat next after the rendition of the justice's judgment, and an order obtained for their issuance, and the necessary bond and security immediately given. This was within time by all the authorities. *Newman v. Rodgers*, 9 Hum., 120; *Johnson & Fenneer v. Deberry*, 10 Hum., 439.

We cannot notice the affidavits of D. B. Hicks, S. Norris, J. Farris and John H. Cartwright, because they are not in the record by any bill of exceptions, and are, therefore, no part of it. And besides, upon a motion to dismiss the petition of Nance, these affidavits could not be received to contradict the truth of the statement contained in it. 2 Swan, 537; 3 Sneed, 326.

This is enough to dispose of the case. But we are inclined to think the motion to dismiss come too late. The record shows that the writs were awarded upon the petition of Nance, at the January Term, 1858, of the

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Circuit Court, the *parties appearing by their attorneys*, and the motion was not made till the September Term afterwards, passing by the May Term. *Dwiggins v. Robertson*, 1 Tenn., 81; 3 Sneed, 326.

We reverse the judgment and remand the cause, to the end a trial may be had upon the merits.

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1. **SLAVES.** *Conversion. Trover and case.* To constitute a conversion, there must be a positive tortious act. A mere nonfeasance or neglect of some legal duty will not suffice to support trover, although it may constitute sufficient ground to maintain an action on the case. Hence, although the tacit consent of a person to receive the services of the slave of another, for some purposes, might be equivalent to a previous command, it would not amount to a conversion of the slave.
2. **SAME.** *Constructive conversion.* The doctrine of constructive conversion, as applied to slaves, must be carefully guarded, or its operation will be extremely mischievous.
3. **SAME.** *Possess the two-fold character of persons and property.* *Act of 1803, ch. 13, § 8. Act of 1831, ch. 103, § 1.* Under our modified system of slavery, slaves are not mere *chattels*; but are regarded in the two-fold character of persons and property. As persons they are accountable moral agents, possessed of the power of volition and locomotion, and clothed with certain rights by positive law and judicial determination. Other privileges and indulgences have been conceded to them by the universal consent of their owners. Such as being sent to perform those neighborly offices common in every community; being allowed, by universal sufferance, at night, on Sundays, holidays, and other occasions, to go abroad, to attend church, &c. And the police regulations, established by the acts of 1803, ch. 13, §§, and 1831, ch. 103, § 1, have no reference to such usages.

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4. *SAME. Same. Same. Verbal consent of the owner.* If it were conceded that a person who permits the slave of another to come or remain on his premises, without a *written pass* from his master, is guilty of a violation of the act of 1803, nothing can be predicated of it more than that he incurs the pecuniary penalty prescribed for such violation of the act. Although in a suit to recover the penalty, the party may not defend himself upon the ground of the parol license of the master, yet, in a civil suit, such verbal consent would be a sufficient defence, and this may be established either by direct evidence, or be implied from circumstances.
5. *SAME. Injury resulting from furnishing liquor to a slave.* If a person furnishes liquor to the slave of another, he may not only be held amenable for a violation of the statute; but, if the slave should become intoxicated thereby, and, as an immediate consequence of this drunkenness, should suffer injury, such person would be amenable to the master, but not as for a conversion.
6. *DAMAGES. In trover and case.* In *trover* the rule of damages is arbitrary; the measure, in general, is the value of the property tortiously converted. But in *case*, which is an action founded on the plaintiff's title in justice and equity to receive a compensation in damages, they are to be estimated by the jury in view of all the circumstances of the particular case; and, under the general issue, the defendant may give in evidence any facts or circumstances which in equity are sufficient to bar the plaintiff's claim.

FROM RUTHERFORD.

This cause was tried at the July Term, 1858, DAVIDSON, J., presiding. Verdict and judgment for the plaintiff. The defendant appealed.

E. H. EWING and W. L. MARTIN, for the plaintiff in error.

J. B. PALMER, for the plaintiff in error.

The defendant below offered to prove by several witnesses, which was rejected by the Court, "that they

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had lived in the neighborhood for many years; were well acquainted with the custom of the country in reference to corn shuckings, and that the custom was, always, when a person desired to procure help from his neighbors to assist in shucking corn, to send word to them in any way that is convenient; and that when slaves attend, it has not been the custom to inquire whether they have been sent by their masters, but to permit them to shuck corn, taking it for granted that they are there by the consent of their masters. That it has also been the custom, on such occasions, to furnish whiskey, &c."

The Court erred in excluding this testimony, because if such were the well established usage or custom of the country and of the neighborhood of these parties, Allen's consent to the presence and services of his boy Isaac at Jones', would have been the legal presumption protecting Jones in accepting from him reasonable labor of that character, and in order to take himself out of such legal presumption, or its operation, Allen must have done so by announcement, or some other manner of dissent, made known to the neighborhood or to Jones. In this country, the legitimate presumption, in the absence of proof to the contrary, is, that the master permits those accommodations by his servants for his neighbors, which are usual and customary, and which are esteemed necessary to a good neighborhood. Therejected testimony shows corn shuckings to be prominent among that class of customs.

This position is distinctly within the analogies of the law of agency. Indeed, a slave performing services for another under such circumstances, may very well be re-

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garded as the *servant* or *agent* of the master, acting in pursuance of his implied consent and authority. And why should not custom be the same evidence of law in this case as well as in others? If the presumption here insisted upon be in favor of Jones, then, in order to make out a case of conversion against him, it must be shown, that he employed Isaac in some unreasonable or unusual manner. This is not shown. Jones furnished some whiskey to all the slaves, including Isaac. This was customary. And if wrong in any sense, it was only morally and not legally so. There is no proof that the boy was at all intoxicated, or injured, in any sense, by its use.

His honor below charged the jury, "that the law charges the defendant, Jones, with a knowledge as to whether the slave Isaac was at the husking with or without the authority and consent of the owner," &c. This is error; for if the presumption contended for in this brief be correct, the very reverse of this charge is the law. The *W. & A. R. R. Co. v. Fulton*, 4 Sneed, 589, does not apply to this case, because railroad companies sustain a very different and more important relation to the public, and particularly to the owners of slaves, from mere private individuals. Traveling on railroads is more or less dangerous. They provide the means of a rapid and hasty flight of the slave from the owner, if permitted to pass upon them without express consent from the master, and no usage or custom exists justifying their transportation on them without consent. The law very properly, therefore, upon general principles, charges railroad companies with knowledge as to the master's consent. But not so with the

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case at bar, for none of these reasons exist. Besides this, Jones evidently believed, or had reason for so believing, that Isaac was there by his master's *express* direction and authority.

The Court below charged the jury in substance, that it was equally a conversion of the slave Isaac by Jones, either "to put him to service by husking corn, or to accept and appropriate such labor, with a knowledge that it was performed voluntarily by the slave." We do not think this a correct statement of the law. There is certainly a manifest difference between ordering the slave of another to do an act—in other words, exercising authority and control over him, and merely suffering or permitting him to perform the same act voluntarily; because, in the first case, he is placed under the restraints of a command, or assumed authority and dominion over him, which may or may not result in injury to him; while, in the other instance, he acts free from all compulsion, and whatever he may do, he is under no other person's dominion and authority than his master's.

E. A. KEEBLE, for the defendant in error.

The plaintiff in error violated an express statute by permitting the slave of the plaintiff to come, and other slaves to collect or assemble at his dwelling, negro or out-houses, without a written permission. Act of 1803, ch. 13, § 3, C. & Nich., 667; act of 1831, ch. 103, § 1, C. & Nich., 682.

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And by the act of 1855-6, each master and mistress was made the legal patrol of his or her premises.

Defendant was then guilty of an illegal and wrongful act to permit plaintiff's slave to come to or to be on his premises, and, by statute, in giving him whiskey.

The unusual assemblage, at an unusual, illegal time, at, for them, an illegal place, the illegally giving the intoxicating drink, naturally led to brawls, which naturally lead to personal collisions, which naturally lead to personal injuries and to death.

For these consequences the defendant is liable, although the injury was inflicted by a third person; (see cases cited in note, 2 Parson's on Contracts, 458,) and although a lapse of time may have intervened between the wrongful act and the injury. *Dickinson v. Boyle*, 17 Pick., 78.

If the plaintiff's horse had escaped into defendant's enclosure, through a defect in the fence, and an improperly put up haystack had fallen on him and killed him, the defendant would have been liable. *Powell v. Salesbury*, 2 Yo. & Jer., 391, cited in the note above.

It is an undisputed principle, that where a loss is to fall on one of two men, he must suffer who is to blame. So that defendant is liable on the second count.

Upon the first count, defendant is liable for a conversion of the slave, by permitting and encouraging him to remain on his premises.

By using him in and about the business of defendant. "For if a man make use of a thing found or delivered to him, it is a conversion." "So if he misuse it." 2 Saunders' Rep. 479.

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The wrongful use or assumption of title is a direct conversion, and no demand, and refusal, is necessary before suit. The using of a thing, as the wearing of apparel without the license of the owner, is a conversion, and the intent is nothing. *Browne on Actions at Law*, 437-8, 435.

A conversion is a deprivation of property to the plaintiff, and does not imply a transfer of property to the defendant. *Browne on Actions at Law*, 435.

The authority of these cases referred to above have been recognized by this Court in *Bell v. Cummings*, 3 Sneed, 281, and in the *Western & Atlantic R. R. Co. v. Fulton*, 4 Sneed, 589.

MCKINNEY, J., delivered the opinion of the Court.

This was an action on the case, to recover the value of a slave, the property of Allen, alleged to have been wrongfully converted by Jones. Verdict and judgment were for the plaintiff, for \$1050.00.

The following are the material facts: In the fall of 1857, Jones had a corn-husking. He invited his neighbors to assist him, and sent a message to Allen, requesting him to send help. About twenty five white men, and seventy-five negroes assembled, after dark; and among other negroes, was *Isaac*, the property of Allen. About ten or eleven o'clock in the night, the slaves were called to supper, and after supper, they were directed by Jones to go home. Most of them left, but some,

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(and Isaac among the number,) remained in the back yard some half an hour, amusing themselves wrestling. While thus engaged, a white man, whose name is Hager, approached Isaac, and without any provocation, as it seems from the record, stabbed him mortally, and he died in a few minutes after. Jones had retired into the house, after directing the slaves to go home, and knew nothing of the occurrence until after it was over. It seems that the messenger by whom Jones sent the request to Allen for help, did not deliver the message, but Jones was not informed of his neglect to do so, until sometime after the murder of the slave. There is no direct evidence that the slave Isaac went to the corn-husking, by the permission, or with the knowledge of his master. The proof shows, that Jones knew that Isaac was present, and engaged in husking corn with the other slaves; and it is not shown that he objected to his being there, or made any inquiry as to whether his master had given him permission to attend. It is also shown, that Jones handed around spiritous liquor to the hands while at work, and gave it to Isaac as well as to the other slaves; but there is no intimation that Isaac, or any one else, was intoxicated, except Hager, who came there drunk, and without being invited.

The declaration contains two counts. The first is in trover, for an unlawful conversion of the slave; and the second is a special count in case. The *gravamen* of the latter count is, that Jones knowingly and unlawfully suffered the slave, without a written permit, or consent from his master, to go upon his premises with other slaves; and being so there, employed said slave in husk-

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ing corn; and while thus employed upon the defendant's premises, said slave was killed, and lost to the plaintiff.

The verdict was upon the count in trover. The Court charged the jury, in substance, that, by law, the defendant was bound at his peril, to know whether the slave was present at the corn-husking by the authority and with the consent of his owner. And if there without such authority and consent, although the defendant may have believed that he was present in pursuance of the message sent, and supposed to have been delivered to his master, the defendant assumed to exercise any authority over him inconsistent with the dominion of his owner, either by putting him to service in husking corn, or with knowledge that he was voluntarily so engaged, in sanctioning his employment, and in receiving and appropriating his labor to his own use, that then the plaintiff might elect to treat such assumed authority as a *conversion* of the slave, and sue in trover for his value. That the gist of the action was not the killing of the slave by Hager, but the wrongful conversion of him by the defendant.

The Court excluded evidence of the usage of the country, of slaveholders sending their slaves on such occasions to help their neighbors, on request, without any written evidence of permission or consent.

Two questions arise upon this record: 1st. Whether, under the circumstances, the law affords any remedy to the plaintiff, against the defendant; and if so, what the appropriate remedy is; whether trover, or a special action on the case. The inquiry is important, not merely as a question of pleading, with a view to preserve the proper distinction between the different forms of action;

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its chief importance in the present instance, is in view of the question of damages. In *trover*, the rule of damages is arbitrary; the measure, in general, is the value of the property tortiously converted. But, in *case*, which is an action "founded on the plaintiff's title in justice and equity to receive a compensation in damages." 2 Stark. Ev., 212, the damages are to be estimated by the jury, in view of all the circumstances of the particular case; and under the general issue, the defendant may give in evidence any facts or circumstances which, in equity, are sufficient to bar the plaintiff's claim. *Id.*

to it
The argument for the plaintiff assumes, that the plaintiff was guilty of a violation of positive law, in suffering the slave to remain upon his premises without the master's *written* permission or consent, and the charge of the Court seems to sanction this position. The act of 1803, ch. 13, sec. 3, declares, that "no person or persons, shall knowingly permit any slave or slaves to come, collect, or assemble, at his or their dwelling-house, negro-house or houses, without a *written pass* from the owner, overseer, or person in whose employ such slave or slaves may be, setting forth his or their business, and time of absence, &c., under the penalty of ten dollars. The act of 1831, ch. 103, sec. 1, forbids "All assemblages of slaves, in unusual numbers, or at suspicious times and places, not expressly authorized by the owners;" and requires that all such assemblages shall be dispersed by any patrol of the bounds, or constable or justice of the peace. And by the second section, "Any person or persons, who shall knowingly permit any such assembly to be held on his

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or her land or premises," shall be liable to indictment, &c.

By a subsequent statute, every master or overseer is constituted a patrol for his own premises.

The object of these provisions is obvious enough. For reasons of policy and necessity, it has been found indispensable, in every slave-holding community, to provide various police and patrol regulations, giving to white persons, other than the owner, the right, and making it the duty, under certain circumstances, to exercise a control over slaves. The safety of the community, the protection of the person and property of individuals, and the safety of the owner's property in his slaves, alike demand the enactment of such laws. But these statutory provisions must be understood and expounded, according to the manifest intention of the Legislature. We are not to forget, nor are we to suppose that it was lost sight of by the Legislature, that, under our modified system of slavery, slaves are not mere *chattels*, but are regarded in the two-fold character of persons and property. That as persons, they are considered by our law, as accountable moral agents, possessed of the power of volition and locomotion. That certain rights have been conferred upon them by positive law and judicial determination, and other privileges and indulgences have been conceded to them by the universal consent of their owners. By uniform and universal usage, they are constituted the agents of their owners, and are sent on their business, without written authority. And in like manner, they are sent to perform those neighborly good offices, common in every community. They are not, at all times, in the service of their owners, and are allowed, by

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universal sufferance, at night, on Sundays, holidays, and other occasions, to go abroad, to attend church, to visit those to whom they are related by nature, though the relation be not recognized by municipal law; and to exercise other innocent enjoyments, without its ever entering the mind of any good citizen, to demand *written authority* of them. The simple truth is, such indulgences have been so long, and so uniformly tolerated, that public sentiment upon the subject has acquired almost the force of positive law. Would it not be absurd to suppose, that the police regulations above noticed, had reference to such usages?

But, to give to the argument the utmost scope to which it can be entitled, let it be conceded, that the defendant, in suffering the slave to come, or remain upon his premises, without a "written pass" from the master, was guilty of a violation of the act of 1808; what can be predicated of it? Nothing more than that he incurred the pecuniary penalty prescribed for such violation. And it may be admitted, that, *in a suit to recover the penalty*, the defendant could not have successfully defended himself on the ground, that the owner had, in fact, given the slave *parol* license, or consent, to attend the corn-husking. We have held, that on an indictment for trading with a slave, without a *written permit* from the master, it cannot be set up as a defence, that the master, in point of fact, knew of, and consented to the trading with his slave in the given case; and for the simple reason, that, by the express terms of the statute on which the indictment was framed, the evidence of the master's consent is required to be in writing. But, we likewise held, that in a common law

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action to regain the property received from the slave, or to recover its value, the master might be repelled, by showing, that in fact he did *verbally* consent to the traffic with his slave.

The principle, we think, is alike applicable to the present case. And such verbal consent may, as in other cases, be established either by direct evidence, or be implied from circumstances.

The effect of this principle, applied to the case under consideration, is, that the want of a "written pass," would be of no consequence, provided there were sufficient evidence to show the master's verbal consent, that the slave should attend the corn-husking.

But, supposing that no consent of the master was given, in any form, and that the slave merely of his own volition, went upon the defendant's premises, and engaged in husking corn, and that the defendant, knowing that he was there without authority, passively acquiesced in his remaining, and in his continuing to assist in husking corn; would this amount to a conversion? Clearly not, in our opinion. To constitute a conversion, "there must be a positive tortious act." A mere non-feasance, or neglect of some legal duty, will not suffice to support trover, although it may constitute sufficient ground to maintain an action on the case. *Bromley v. Coxwell*, Bos. and Pull., 438; *Ross v. Johnson*, 5 Bur., 2825; 2 Starkie's Ev., 840. The tacit consent of the defendant, to receive the service of the slave, might, for some purposes, be equivalent to a previous command. It would undoubtedly be so, in a suit brought to recover the value of the slave's services. But it cannot be held to amount to a conversion.

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This doctrine of *constructive* conversion, as applied to slaves, must be carefully guarded, or its operation will be extremely mischievous.

The only affirmative acts, so to speak, imputed to the defendant, furnishing the slave with *supper* and a *dram*, are entitled to no consideration in the determination of the point of conversion.

It is certainly true, that if one furnishes liquor to a slave, he may be held amenable for a violation of the statute; and it is likewise true, that if the slave should thereby become intoxicated, and, as an immediate consequence of this drunkenness, should suffer injury, such person would be answerable to the master, but not as for a conversion.

It is not assumed that the defendant is liable in damages for the killing of the slave. The charge of the Court negatives his liability on that ground, and we think properly. For the killing of the slave cannot be regarded as the natural and proximate consequence of the omission of duty imputed to the defendant.

The result of our opinion is, that trover will not lie upon the facts in this record; and in instructing the jury otherwise, the Court erred. The remedy is case, if there be any.

Judgment reversed.

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ALPHA YOUNG v. ADAM BUTLER.

1. **SALE OF REAL ESTATE. Chancery. Deraignment of title. Executed and executory contracts.** If the purchaser of a tract of land accepts a deed with covenants of warranty, and has possession, he cannot ask for a deraignment of title, as he could if his contract was executory.
2. **SAME. Same. Covenant against incumbrances.** It is incumbent on the vendee of real estate, before he can rely upon a breach of a covenant against incumbrances, to aver and prove the paramount title with all the particularity required of a plaintiff in an action of ejectment.
3. **SAME. Same. Covenant of seizin.** Upon covenants of seizin and right to convey, the vendee must, before he is entitled to any relief, by averment and proof, negative the words of the covenant.
4. **SAME. Same. Eviction. Fraud. Insolvency of the vendor.** If the vendee of real estate accepts a deed with covenants of warranty, a Court of Chancery will not rescind the contract or stay the collection of the purchase money, for a mere defect of title, if the case be free of fraud and the vendor is solvent, but will leave the party to his remedy upon the covenants taken. If the covenants have been actually broken, and the vendor is insolvent, a Court of Equity may restrain him from proceeding to collect the whole amount of the purchase money, and may set-off the damages occasioned by the breach of the covenants against such unpaid purchase money.

FROM WARREN.

This cause was heard upon original and cross-bills before Chancellor RIDLEY, at the September Term, 1857. He pronounced a decree for the complainant in the original bill. The defendant appealed.

W. BRITTON, for the complainant assumed, that, when a party takes possession of a tract of land,

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under a deed with covenants of general warranty of title, without any fraud on the part of the vendor, he has no right to come into a Court of Chancery and allege or set up a defect in the title. If the vendee is evicted, he has his remedy at law. *Buchanan v. Alwell*, 8 Hum., 516; *Kimbrough v. Benton*, 3 Hum., 116; *Elliott v. Thompson*, 4 Hum., 99.

T. B. MURRAY, for the defendant.

W. P. HICKERSON, for the defendant, said:

We insist the decree is clearly erroneous, because Young by his bond, guarantees that he has a good and sufficient title to the whole tract, and that it contains 567½ acres. And a vendor who asks, as in this case, a specific execution of a contract, must show a clear, legal title. A vendee will not be compelled to take a doubtful title.

But it is said he has a title by prescription. A title by prescription can only be acquired when a party, and those under whom he claims, have been in possession under a title, defining the boundaries, continuously for twenty years.

There is not one word in this record showing that Young, or those under whom he claims, ever had possession, outside of the boundaries of the land, the 141 acres covered by the aforesaid grants.

But if it were admitted that Young had a title by prescription, Butler is not compelled to take such a title. *Cunningham v. Sharp*, 11 Hum., 116.

But it may be said, that although this is so, still

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this Court has no jurisdiction, as Butler is in possession under a deed with covenants of warranty. There is, I admit, a class of cases to which this rule applies. Such is the case of *Elliott v. Thompson*, 4 Hum., 99-102.

But that rule cannot apply to the case at bar:

1. Because Young himself comes into this Court asking the Court to execute specifically the contract between him and Butler. This Court has original and exclusive jurisdiction in such cases. Butler having been brought here by Young, presents his cross-bill, and says, to Young, I want just what you ask; I want to execute the contract specifically; I want a clear title to the land; I want to pay the purchase money; and if you cannot execute the contract substantially, I want a rescission of the contract. Young answers this bill, and says, report upon my title; it is good.

2. Because, although Butler has a deed, he did not receive it, as his title, but objected to it at the time, and still holds Young's bond.

3. Because the facts, as charged in Butler's cross-bill, and which are abundantly sustained by the proof, show that the attempt to sell Butler land to which he had no title, and to get him to receive the deed therefor, amount to a charge of the grossest fraud on Young's part. This gives the Court jurisdiction. *Woods v North & Johnson*, 6 Hum., 309.

4. This Court has jurisdiction to rescind this contract, because it cannot be executed. Young has Butler's money, and Butler has no title. *Reed v. Noe*, 9 Yerg., 283.

But if there was doubt about the jurisdiction, Young

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having answered, and this being, at least, a case in which this Court, under all the facts in this case, has concurrent jurisdiction with a Court of Law, will not, after all the costs that has been incurred, and after Young has thus experimented with the Court as to his title, turn Butler over to a Court of Law to begin again.

If this be so, in this sort of case, it is hard to understand what is meant by the act of 1851 amending the Chancery practice.

WRIGHT, J., delivered the opinion of the Court.

This case comes to this Court upon bill and cross-bill.

In November, 1855, the complainant sold to the defendant a tract of land, upon which he resided in, Warren county, including some valuable mills thereon, together with some personal estate. The consideration of the entire purchase was \$7,000, \$1,300 of which the defendant paid in cash, and executed his note for the residue, due the first of April, 1856, at which time he was to have possession and a deed in fee-simple, upon completing the payment of the purchase money.

He took of complainant a title bond to that effect, in which there is a stipulation that the tract of land shall contain 567½ acres; and they mutually agreed that a survey should be made by the county surveyor between that time and the first of April, and prior to.

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the making of the deed, with a view to ascertain the exact quantity.

The land sold was made up of various small tracts, which lie adjoining each other; and they were described by metes and bounds with great particularity in the title bond.

On the first of April, 1856, defendant appeared, demanded and received possession of the tract of land and other property, and has held it and resided upon it ever since, save as hereinafter shown.

He averred his ability to pay the purchase money at the time, and his willingness to do so upon receiving a deed.

It appears, that about the time of the purchase, one Wilkinson had possession of, and claimed about fifty acres within the bounds of the tract, and that a suit was pending in the name of one Black, under whom complainant derived title, and for complainant's benefit, to recover the same of Wilkinson. But neither complainant or defendant then regarded Wilkinson's claim as of any avail, or at all in the way of the trade between them.

The county surveyor had made two surveys of the land, in one of which he found the quantity to be 611 acres, and in the other 567½ acres.

But the defendant affected not to be satisfied with these surveys. Finally, however, after he had examined them, and after a good deal of discussion as to the boundaries of the land and the nature of the title, he agreed to accept a deed, and pay the unpaid purchase money. And on the 24th of April, 1856, complainant executed to him a deed in fee simple, with full cove-

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nants of warranty, which he accepted; caused complainant to acknowledge it before the clerk, and on the same day had it duly registered.

But he still did not complete the payment of the purchase money; but on the same day, after the registration of the deed, presented to complainant, in writing, various objections to the title, which seem to have been frivolous and unfounded.

The complainant, however, attempted to remove them, and caused one Mercer to execute a quit-claim deed to the land to the defendant, in which he disclaimed all interest, and recited that he made the conveyance to satisfy the defendant.

The defendant still did not pay the residue of the purchase money, and complainant has obtained judgment at law for the same; and also filed an attachment bill, and has attached certain personal estate of defendant to pay the debt.

The object of the cross-bill is to stay, by injunction, the collection of the remaining unpaid purchase money, until complainant shall exhibit a valid and connected chain of title to the land, and if any be lost by better title, an abatement for that; and, also, that an accurate survey be had, and an abatement for any deficiency in quantity.

The clerk and master, upon a reference to him, reported the land taken by the Wilkinson suit at forty-four acres, and the deficiency in quantity at nine acres—in all fifty-three acres; and that, as to the residue of the tract, the title was valid.

To this report the defendant filed only two exceptions; first, because the clerk and master had reported the

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title of Young good to the whole tract, except fifty-three acres, when, in fact, he does not show a good and valid title to any portion of said land; second, because he only allowed defendant credit at \$9.50 per acre for the deficit, when the proof showed the value of said deficit, as a part of the whole tract, to be \$15 per acre.

The Chancellor overruled the exceptions on both sides, and decreed in accordance with the report, which was confirmed, that complainant had a valid title to the entire tract, and that it contained the proper quantity, except the fifty-three acres; and, as to the value of that, gave a decree against complainant and his sureties in a refunding bond, executed in the cause upon a dissolution of defendant's injunction upon the judgment at law, which complainant had been allowed to collect.

To this decree complainant submits, and the defendant appeals to this Court.

We think the Chancellor's decree is correct.

The counsel of defendant have assumed in argument here, that the decree is erroneous upon several grounds, all of which we deem untenable.

In the first place, the bill of the complainant can not, as they insist, be regarded as one seeking the specific performance of the contract between complainant and defendant. It has none of the features of such a bill. Its only object is to attach and sell the defendant's estate to pay the remaining purchase money. It does not even seek to enforce a lien upon the land. He cannot be regarded as standing here upon the *title bond* and a bill to enforce its performance. He has accepted a deed with covenants of warranty, and has

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possession, and is in no condition to ask for a derangement of title, as he would be if he stood upon an executory contract. The case of *Cunningham v. Sharp*, 11 Hum., 116, to which we have been referred, is, therefore, wholly unlike this. The position assumed for him, that he did not freely and fairly accept the deed, is, we think, entirely unfounded. From the facts in this record, we have no doubt that it was his purpose, from the beginning, to obtain the deed and the possession of the property without paying for it, until such time as it suited his convenience to do so.

Neither is there any foundation for the position assumed, that complainant was guilty of fraud in the sale of this land, upon which to base a ground for the interference of a Court of Equity. No such thing is alleged or pretended in the answer to the original bill, or in the cross-bill. And in the amendment to the cross-bill it is evident the charge is not earnestly insisted on. And, if it were, it is denied in the answer, and not sustained in the proof.

The deed, in addition to the covenant of general warranty, which was all the title bond required, contains covenants of seizin, right to convey, and that the land is free from incumbrances. And it is said, if complainant had no title, a Court of Chancery may relieve on these covenants, because there was an instantaneous breach of them.

A conclusive answer to this is, that defendant nowhere, either in his bill or answer, alleges or avers any want of seizin or title in complainant, or the existence of any valid incumbrance, much less does he show any such thing by proof.

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He simply says, the complainant has *failed to produce* such a title as he is entitled to receive; that he is unwilling to rescind the contract, inasmuch as he has gone on the land to live, and has made valuable improvements on it, and he asks for an injunction against the purchase money until the complainant shall exhibit his title. And in the amended bill he alleges that certain persons, by name, claim small portions of the land; but does not pretend to aver that these claims have any validity whatever. As to the covenant against incumbrances, it was incumbent on the defendant, before he could claim anything under it in his cross-bill, to aver and make out, by proof, the paramount title with all the particularity of a plaintiff in ejectment. Rawle on Covenants for Title, (2d ed.,) 87, 135, note 1, 147; *Bickford v. Page*, 2 Mass., 461.

And as to the covenants of seizin and right to convey, it was certainly necessary to negative the words of the covenant, and, perhaps, in the proof, to take some steps towards showing a breach of the covenants. Rawle, 84, 87, 88.

So that if defendant, upon his cross-bill, be regarded as in the proper form under the effect of the 9th section of the act of 1852, ch. 365, because complainant failed to demur and answered, yet these covenants will not avail him, because he has shown no breach of them.

We put out of the case altogether the claim of Wilkinson, and any deficiency in the area of the tract, because defendant was allowed for that in the decree, as much, certainly, as he was entitled to.

The settled rule, however, is, where there has been no eviction, a Court of Chancery will not rescind the

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contract, or stay the collection of the purchase money, if the case be free of fraud, for a mere defect of title, but will leave the party to his remedy upon the covenants taken. *Woodruff v. Bunce*, 9 Paige, 443; 1 Johns. Ch. R., 218; 2 Johns. Ch. R., 519; 8 Hum., 516-519; 4 Hum., 99.

And this is so if the covenants have been actually broken, unless the grantor is insolvent, in which event a Court of Equity may restrain him from proceeding to collect the whole amount due for the purchase money, and may offset the damages occasioned by the breach of the covenant of seizin, &c., against such unpaid purchase money. 9 Paige, 443, 444; 2 Johns. Ch. R., 519; 4 Hum., 66-68.

But here complainant is solvent, and there is no averment to the contrary.

It follows, if complainant's title be defective, defendant can have no relief in this proceeding.

But we have little doubt, from what we see in this record, that though the title, perhaps, is not at present so made out as that defendant would be obliged to accept it, if this were an application for a specific performance; yet, that, with proper care and labor, a valid title may be shown in complainant.

Decree affirmed, with costs.

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WILLIAM RANKIN v. J. A. BLACK, ADM'R, *et al.*

1. SALE OF REAL ESTATE. *Chancery. Joint purchase.* If two or more persons make a joint purchase of real estate, each is entitled to participate equally in profit and loss, without regard to equality in payment of the purchase money; but the property thus purchased will be held bound for any excess paid by one over another.
2. SAME. *Same. Partition.* If one of the joint purchasers dies, a proceeding to sell the real estate thus purchased, to equalize the payments, does not fall within the rules applicable to sales for partition, and for the payment of debts, requiring proof, an account, &c. It is in the nature of any other original suit in chancery, and governed by the same rules of practice.
3. SAME. *Same. A cross-bill by the minor cures defects.* If real estate is sold upon informal proceedings, and a minor defendant files a cross-bill by *prochein ami*, and has the sale set aside, and a re-sale ordered, his position as defendant is changed, and any defects that existed in the proceedings on the original bill, can not affect the validity of the second sale.
4. SAME. *Same. Sale will be sustained if to the interest of the minor.* If real estate in which a minor is interested, is sold under a decree of Court, and the proceedings are not void, but merely voidable, the sale will be sustained if most advantageous to the minor. If it is absolutely void, it cannot be confirmed.

FROM WARREN.

At the September Term, 1858, Chancellor RIDLEY pronounced a decree sustaining the sale of the real estate. The purchasers appealed. The facts are stated in the opinion of the Court.

W. P. HICKERSON, for the purchasers.

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HARRISON, for the purchasers, said :

The act of 1827, ch. 54, directs, that where the heirs or legal representatives of a deceased person shall inherit any real estate, and the same shall be so situated that partition cannot be made, or where the land is so situated that it would be manifestly to the interest of said heirs that it should be sold, a bill may be filed, *and upon satisfactory proof* of these facts, the Court may decree a sale. The act of 1829, ch. 35, provides, that where any real estate is held by tenants in common, and the same cannot be divided as pointed out by law, or where it is manifestly to the interest of said tenants that the same should be sold, a bill may be filed, "and the same proceedings to be had, and decree made, as said act of 1827, ch. 54, points out in cases of the heirs of persons dying intestate."

In this case, no proof was taken before the second sale, to show that the thirteen and a half acres of land in the town of McMinnville, was not susceptible of division between the parties; and although the joint tenant, Rankin, might have an equitable lien for an over advancement of purchase money, on the interest of his co-tenant, if the land had been divided; or, upon the proceeds of the sale of the whole tract, if proof had been taken to show: 1st, That the land was not susceptible of division; and, 2d, That it was necessary to sell the land, on account of the deficiency of personal assets; yet it was necessary, in order to authorize the Court to decree a sale, and divest the title which the minor had in the land, that the provisions of the act of 1827 and 1829, should be complied with.

Mrs. Pope, the widow, for herself and as next friend

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of her son, Byron Pope, the minor, filed a cross-bill praying the Court to set aside the first sale. The Court, before ordering a re-sale of the land, in addition to taking the steps pointed out in the acts of Assembly above referred to, should have appointed a guardian *ad litem* for the minor.

Upon the hearing of the petition in this cause, to set aside the second sale, and to release the purchaser, Rowan, the Court was of the opinion, that a good title could not be made to the purchaser, on the ground that the minor was not before the Court; but regarding this defect in the proceedings as merely technical, proceeded to appoint a guardian *ad litem*, with the view of removing the technical objection to the validity of the sale. The Court had no jurisdiction to *order* the second sale, the proper parties not being before the Court. The sale being thus void, it was not competent for the Court, by any subsequent proceedings, to force the title upon the purchaser. *Crabtree v. Niblett*, 11 Hum., 488.

In the case in 11 Hum., 488, the guardian answered, making in his answer the proper issue, admitting the existence of debts, &c., and that there was no personal property. In this case, the guardian of Byron Pope, the minor, subsequently appointed as above, merely answers, insisting, that on account of a decrease in the value of the real estate, it would be doing his ward an injury to have the second sale set aside.

In this case, as in the case of *Frazier and Tulloss v. Frazier et al.*, 1 Swan, 79, the real estate was sold before any account was taken, or report of deficiency of personal assets confirmed by the Court.

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Nor can the subsequent report, confirmed by the Court, validate the sale previously made. 1 Swan 79.

J. L. SPURLOOK, for the heirs, said:

Rankin and Pope were joint purchasers of the land in controversy, by deed, bearing date 1st of March, 1852.

Rankin had paid, before the last sale was ordered, \$1151, more than his part of the purchase money, as appears from the master's report.

We insist, on an adjustment of accounts between joint purchasers, or others standing in their shoes, the matters must be equalized; and the land is held bound by a Court of Equity, for the excess paid by either, above his one-half of the consideration.

The Court say it is not a lien or a mortgage, but a principle of equity, producing the same result in a given case. *Gee v. Gee*, 2 Sneed, 395.

The joint tenant, who has paid an excess above his interest of the purchase money, may look to his cotenant's interest in the land, as a source of reimbursement, without subjecting his personal property to the payment of said excess. Therefore, if the tenant who has not paid his part of the purchase money die, it is unnecessary in a proceeding instituted by his cotenant, to subject the interest of the deceased tenant to the payment of purchase money advanced for him, to show that his personal property has been exhausted;

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neither is there any necessity for fixing a minimum value on his interest in the joint property, because his co-tenant, who has advanced the money for him, is entitled to it out of said interest, irrespective of what it may bring.

If joint owners hold their interest unincumbered, and one is a minor, a sale cannot be had, without first showing that the property is not susceptible of a fair division, or that it is manifestly for the interest of the minor to have it sold; but not so when one has paid an excess over his part of the consideration, and is seeking the recovery of his money out of the interest of the other. There was no necessity for the service of process upon the minor, or the appointment of a guardian *ad litem*, because he was before the Court by his next friend, as complainant. See Brown's case, 8 Hum., 200.

The Court is referred to the decrees pronounced in the case in the Court below, under which the land was sold. Reference is also had to the answer of the guardian *ad litem*, in which he insists, it would be manifest injustice to his ward to set said sale aside.

CARUTHERS, J., delivered the opinion of the Court.

The only contest, in this case, is upon the petition of S. D. Rowan, to be relieved from the purchase of certain lots of ground in and near the town of McMinnville, sold under decree of the Chancery Court in these cases, upon the ground, that owing to the defects in the proceedings, a good title cannot be made to him.

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Wm. Rankin and Levander Pope purchased of F. K. Bell, thirteen and one-half acres of ground, including a tavern-house, in McMinnville, at \$8,000, in 1852. Pope died soon after, leaving Musadora, his widow, and Byron, his only child. He had paid only about \$350 of the consideration before his death, and Rankin largely more. Black administered on the estate.

Rankin filed his bill against the administrator, widow, and minor heir of Pope, charging his excess of payment, that the estate was insolvent, the land not susceptible of equal division, and praying that it might be sold, the payments equalized, and the proceeds divided, after the full payment of the consideration; taxes, and expenses. Such proceedings were had as that the land was sold in six lots, on the 9th of December, 1854, for \$8,670. Rankin was the purchaser of four of the lots, at \$2,880. At March Term, 1855, the report of this sale was confirmed, and title vested in the purchasers, subject to the lien for the purchase money.

Musadora Pope for herself, and as next friend for her son Byron, filed her bill on the 14th of December, 1856, to set aside the sale which had been made, and have a division or resale, because the former proceedings had been such as not to be binding upon them. This bill was filed against Rankin and the other purchasers, and L. D. Mercer, who had become administrator *de bonis non* of L. Pope. The prayer was granted, and a resale ordered. There was no exception to this decree on the part of the purchasers or the original complainants, although they resisted it in their answers, and contended for the validity of the sale under which they purchased. But the Court set it aside, because

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the infant had not properly become a party, and the parties acquiesced.

At the resale, on the 26th of September, 1857, S. D. Rowan being substituted to the bids of J. M. Cain, was the purchaser of lots Nos. 1 and 2, for \$3,190. Britton and others bid off the other four lots at \$1,105—making a total of \$4,385, being an advance upon the first sale, of \$715.

On the 23d of March, 1858, the said S. D. Rowan, the largest purchaser under the last sale, filed his petition to be released from his purchases, because a good title could not be made to the lots, as the sale was irregular and void as to the infant. The widow, and the guardian *ad litem* of the infant, answer and insist that the sale was legal, and attribute the anxiety of the petitioner to pry out defects in the proceedings, to a fall in the price and value of the property. The intelligent guardian of the minor says in his answer, that it would be most unjust and injurious to his ward to annul the sale, as the property could not be sold for so much again. So far, then, as the interest of the infant is concerned, the proceedings should be sustained, if consistent with the law. The question, in such a case, is, was the sale utterly void, or only voidable, and capable of confirmation.

The defects are thus stated in the petition: "A good and sufficient title cannot be made to your petitioner for the reason that no proof was taken as to the necessity of selling the lots, in order to divide the same among the claimants, and for the further reason, that no account, previous to said sale, of assets, debts, and credits of the estate of said Levander Pope, de-

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ceased." Again, it is stated that there was no proof that partition could not be made, nor that it was manifestly to the interest of the parties to sell. We will briefly examine these grounds of objection to the title.

This is not the ordinary case of an application for a sale for partition by heirs or tenants in common, nor by the administrator or creditors for the payment of debts on failure of assets, nor yet is it the usual case of a bill by a vendor to assert his lien for the purchase money. It rather combines some of the features of all, with the additional feature, that the original complainant, Rankin, and the decedent, L. Pope, were joint purchasers, who made unequal payments of the consideration. The main object of the bill is to equalize the payments by the sale of the property, and divide the profits, if any. It is charged that the decedent only paid \$350 in his lifetime, and his administrator about \$400 more, and that the balance was paid by the complainant. The administrator is made a party to ascertain the state of accounts, and make an exhibit of the assets in his hands. He answers that the estate is insolvent, as charged in the bill, and so it turns out upon the report of the master afterwards made. The widow and infant heir were made parties, but because the answers of the guardian *ad litem* and of the widow were not such as the rules of the Court required, the first sale was set aside, upon their cross-bill for that purpose, and the re-sale upon the prayer of their bill ordered. It is difficult to see how any defects in the service of process, or answer of the infant in the original case, if any existed, could affect the last sale, as that was made when he was properly before the Court,

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by *next friend*, in the cross-bill, with a prayer for division or *sale*.

We held, in the case of *Gee v. Gee*, 2 Sneed, 395, that in case of a joint purchase of land, if one paid more than his half of the purchase money, a Court of Equity would hold the land bound for the excess. In that case it was insisted that there was a resulting trust to the extent of the over-payment, and that each was entitled to an interest in the land to the extent of his payment. So that if one had paid none, he would have no interest, though a joint purchaser. That would be so in the case of a resulting trust. But that was not such a case, nor is this.

Where the adventure is joint, each is entitled to participate equally in profit or loss, without regard to equality in payment. But it is a clear principle of equity, that the common property will be held bound for any excess paid by one over the other. It is analogous to the law of partnership by which, as between the partners, the capital must be equalized out of the partnership effects before the profits can be divided.

This case, then, does not fall under the rules settled by our decisions in cases of sale for partition, and for the payment of debts, in relation to the necessary proof, accounts, &c. And that is the ground upon which the petition is based. It appeared by the bill and answers in the original case, that the complainant and deceased were joint purchasers of the land and lots, that their payments were unequal, and also that the estate of Pope was insolvent. This was enough to authorize the sale of the property for the equalization of payments and division of profits. For this the land was bound

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at all events, where there were not sufficient personal assets. But let this be as it may, the sale was made ultimately upon the bill of the infant, by next friend, and all necessary accounts taken, either before or after the sale, to settle and adjust the rights of the parties in the proceeds. The infant, as we see, would be injured by setting it aside, and he is before the Court in a manner and form in which he can legally be divested of his title for the benefit of the purchaser, and, therefore, there can be no objection to the validity of the sale. The widow releases her claim of dower in the interest of her husband in this property. There is, then, no difficulty as to the title, and the decree of the Chancellor dismissing the petition and ordering the money to be paid by the purchaser, is affirmed. The cause will be remanded for further proceedings under the decree for the full settlement of the rights of the parties.

W. LOWE v. E. & K. RAILROAD COMPANY.

1. **PRINCIPAL AND AGENT.** *When agent's authority ceases. Notice.* The power and authority of the agent of a railroad company to receive subscriptions for stock, ceases when the subscription is complete. When made, the subscription instantly inures to the benefit of the company, and creates, in law, a contract directly between the subscriber and the company. The agent has no power to abrogate or annul the subscription; and, consequently, notice of an intention to revoke it must be given to the company, and not to the agent.

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2. **RAILROAD COMPANY.** *Conditional subscription of stock. Revocation of subscription. Notice.* A party who makes a conditional subscription of stock to a railroad company, by agreement with a person who is not the authorized agent of said company, may withdraw or revoke his subscription at pleasure, without notice to the company, at any time while the subscription book remains in the hands of such person, and before the company has acquired any right to or interest in it.
3. **SAME.** *Question Reserved.* The weight of authority is, that a party who makes a conditional subscription of stock to a railroad company, is bound, if the condition is ultimately performed, unless there is an express revocation by him; but this question is not authoritatively determined in this case.

FROM DAVIDSON.

This cause was heard at the January Term, 1858, BAXTER J., presiding. Verdict and judgment for the plaintiff. The defendant appealed.

JOHN MARSHALL and NEIL S. BROWN, for the plaintiff in error.

ANDREW EWING, for the defendant in error.

McKINNEY, J., delivered the opinion of the Court.

This was an action of debt, to recover the amount of several different calls on twenty-five shares of the capital stock of the company, alleged to have been subscribed by Lowe, and which he had refused to pay. Verdict and judgment were for plaintiff for \$300, the amount of the several calls, with interest from the time calls were respectively demanded.

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The main ground of defence to the action was, that the defendant's subscription had been revoked and withdrawn before it was accepted or received by the company.

It appears that some two or three different routes had been prepared for the location of the road. And at a meeting of the board of directors, on the 21st of April, 1854, it was resolved that said road "be located upon the route from Edgefield to a point in or near the town of Springfield, in Robertson county," * * * "upon the condition that a subscription of good and reliable stock, to the amount of at least \$150,000, shall be obtained upon said route, and in the civil district in which Springfield is situated." It seems that great solicitude was felt by a portion of the inhabitants of Springfield to have that village made a point in the line of the road. And to that end, certain individuals, voluntarily, without any appointment or authority from the board of directors, got up subscription papers, and went to work, upon their own individual responsibility, with great energy and zeal, to procure subscribers. Some of these movements, it appears, were made prior to, and in anticipation of, the conditional location made by the board, on the 21st of April, 1854. Amongst others, who took it upon themselves to procure subscriptions for stock, was Edward S. Cheatham, a resident of Springfield. In the paper held by him, the terms of the subscription were stated in writing; and it was stipulated, that the promise and agreement to take and pay for the stock subscribed, was "*upon the express condition that Springfield is made a point in said road.*"

To this paper, and upon the foregoing condition, the defendant subscribed for forty shares, amounting to \$1000;

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which subscription was made after the conditional location of the road before mentioned.

At a subsequent meeting of the board, 29th of July, 1854, a resolution was adopted directing the engineer, as soon as possible, to make the final location of the route from Edgefield to Springfield; and, by another resolution, a call of eight per cent. on the stock subscribed was made, payable in monthly instalments of two per cent., from the 2d day of September following.

Afterwards, on the 9th of September, 1854, the board resolved to rescind, and did rescind and annul the previous resolutions fixing the location of the route from Edgefield to Springfield, on the ground, as the preamble to the resolution states, that the subscription books upon the Springfield route had not been delivered to the board, nor had payment of the calls made by the board, been made; and that, from further surveys, it was indicated that a cheaper and shorter route might be selected.

After this action of the board the Robertson county subscribers held a public meeting at Springfield, on the 25th of the same month, with a view to determine whether they would consent to pay the calls made by the board, while the location of the road was in suspense, running the risk of the final location being made by Springfield. At this meeting the defendant, Lowe, publicly repudiated and revoked his subscription, on the ground that the board had violated its agreement by annulling the previous location of the road; and distinctly directed E. S. Cheatham, who was present and had the subscription book or paper then in his posses-

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sion, to erase his name, and not to deliver it to the board with his name upon it, as he would no longer be a subscriber, and would not pay for the stock; and ever afterwards refused to have any thing to do in the matter. Cheatham, in reply, stated that the subscription book was still in his hands; that it had not been delivered to the board, and would not be for some time. After revoking his subscription, however, the defendant said, that if the location of the road were fixed by Springfield, and work commenced on it, he would be willing to pay the amount of his stock, and even double it, if necessary.

Subsequently, by a resolution of the board, passed on the 19th of September, 1855, the road was permanently and unconditionally located on the Springfield route.

It appears that only about \$130,000 of the \$150,000 of stock required by the resolution of the 21st of April, 1854, was made up.

It is distinctly proved by Mr. Watson, who was president of the company from March, 1854, to some time in 1856, that the Springfield subscription book was not delivered to the board by Cheatham "until the final location of the road in September, 1855, or, perhaps, afterwards;" and not until after this time was the Springfield stock transferred to the books of the company. It is also positively proved by Mr. Watson, that he himself was the *only* agent authorized by the board to receive subscriptions for stock in the road; and that Cheatham was not an agent of the board. He likewise proves, that, as agent, he visited Springfield, made a

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public address, and exerted himself to procure unconditional subscriptions for stock, but failed to obtain any.

The general question upon the foregoing facts, is, was the defendant discharged from liability upon his subscription.

The Court, in substance, instructed the jury, that if the company had accepted the subscription of Lowe, and had performed, or bound itself to perform the condition, he would be liable. But, that until acceptance of his proposition and performance, or an obligation to perform the condition, Lowe had a right to withdraw it. But that to make the revocation effectual, so as to discharge his liability, it was necessary that the company should have had notice of such revocation, before its acceptance of defendant's subscription. That if Cheatham were an authorized agent of the company to receive the subscription, then notice of the revocation to him would be notice to the company.

But if Cheatham were not the agent of the company, in receiving the subscription, but it had been made to him as a mere volunteer, with the view that it should be offered by him to the company, as an inducement to the latter to locate the road by Springfield, then, Cheatham would be the agent of the defendant only; and notice to him of the withdrawal of his subscription by the defendant, would be of no avail. That to be effectual in the latter view, it must appear that notice of the revocation had been brought home to the company, before the defendant's subscription had been tendered to and accepted by the company, otherwise than by notice to Cheatham, and that if the company

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accepted and acted upon it, before obtaining such notice, the defendant would be bound.

We are unable to concur with his honor upon either of the foregoing propositions.

1st. Supposing Cheatham to have been the properly constituted agent of the company; it is clear, that his agency would have extended no farther than merely to receive subscriptions for stock. When the subscription was complete, the authority of the agent was exhausted; and his agency, as to that particular subscription, was *functus officio*. He had no power to do any further act respecting it. The subscription instantly inured to the benefit of the company, and created, in law, a contract directly between the subscriber and the company, to abrogate or annul which, was not within the scope of the agent's power. And, consequently, notice to such agent of an intention to revoke the subscription, would be a nullity. The notice in such case, if it could be available at all, must be to the company. But as the error upon this point was in favor of the plaintiff in error, we need not pursue the discussion further.

2d. Whether Lowe, in the absence of an express revocation, would have been bound by his conditional subscription, notwithstanding the act of the company in annulling the first location, on the faith of which the subscription was made; provided the condition was ultimately performed by the company, is a question not necessary, perhaps, to be considered in the determination of the present case. The weight of authority would seem to be, however, that he would be bound. The subscription in such case, seems to be regarded as a "standing offer," which, when accepted according to

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its terms, and acted upon by the company, ought to be binding. Redfield on Railways, p. 97-8, note 4.

The case before us depends upon the effect of a positive act of revocation by Lowe, before the company had acquired any interest in the subscription.

From the proof we assume the fact to be, that Cheatham was not the agent of the company. The defendant's subscription, at most, was only an offer or proposal intended to be afterwards submitted to the company, and which might be accepted or rejected at pleasure. It was founded on no consideration moving from the company. It created no contract between the defendant and the company,—imposed no binding obligation upon either, previous to delivery and acceptance by the company. Cheatham being the agent of the defendant, with whom the company had no connection; it is clear, that so long as the subscription book remained in his hands, and before the company had acquired any right or interest in it, it was competent to the defendant, (as between himself and the company,) to withdraw or revoke his subscription at pleasure, and without notice to the company, for the simple reason that the latter had not become a party to the subscription, and had no interest in it.

The neglect of Cheatham, whether intentional or not, to erase the name of Lowe, before delivering the book to the company, does not affect the question. There is no technical rule of law applicable to a case like the present, by which the defendant is precluded from availing himself of his discharge, because of want of notice to the company of the fact of revocation, before the subscription book came to its possession.

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The charge of the Court seems to assume, erroneously, that inasmuch as the defendant's name had not been erased, nor had notice of the revocation been given, when the subscription book was delivered to, and accepted by the company, the latter was entitled to regard the defendant's subscription as a valid and binding one, and to hold him liable accordingly. This is a mistaken conclusion. We have seen that no notice to the company was necessary. It received the subscription book at its own peril, and subject to every defence on the part of a subscriber, which existed at the time the book was delivered by Cheatham.

We are of opinion, therefore, that Lowe's subscription was annulled, and that no recovery can be had against him thereon.

Judgment reversed.

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ABATEMENT.

By death. Motion to revive. An appeal in the nature of a writ of error merely suspends the judgment of the inferior Court, and does not annul it. If, therefore, the plaintiff in an action for an assault and battery, dies, after an appeal in error by the defendant, it is not only the right, but likewise the duty of the personal representative to revive the suit in the Superior Court. *Kimbrough v. Mitchell*, 589.

See CRIMINAL LAW.

ACTION.

Discontinuance of. If a party permit a *chasm* in the proceedings to occur, by failing to continue the process regularly from term to term, until service on the defendant, it operates as a *discontinuance* of his suit. *Armstrong v. Harrison*, 379.

ACCOMMODATION ENDORSER.

See SUMMARY PROCEEDINGS.

ADMINISTRATION.

Debt due from an heir. Assignment of interest. If an heir of an estate is indebted to the deceased in a sum which cannot otherwise be made, the administrator, by proper proceedings, may subject the interest of such heir in the real estate, to the payment of said indebtedness. But if said heir has *bona fide* transferred his interest in the estate to an innocent party, the debt not being a lien upon such interest, it cannot be subjected to the satisfaction of said indebtedness. *Towles v. Towles*, 601.

See PRACTICE AND PLEADING. ABATEMENT. ADVANCEMENT.

ADMINISTRATORS AND EXECUTORS.

See ADMINISTRATION. PRACTICE AND PLEADING. ABATEMENT.

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Notes held by the intestate. Case in judgment. Notes held by the father at the time of his death, against a son, are not to be charged as an advancement, unless it be proved that they were used merely as evidences of a gift or advancements to the son, or that the father did not intend to collect them. The intestate held several notes on an insolvent son. The son died before the father, leaving children. The notes came to the hands of the administrator without any evidence explaining the intention of the intestate, as to whether he held them as debts, or intended them as gifts to his son. Held, that *prima facie* they are debts, and cannot be charged as advancements, in the absence of proof showing that the deceased did not intend to collect them, or regarded them as gifts to his son. *Vaden, Adm'r, v. Hance*, 800.

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See **CERTIORARI AND SUPERSEDEAS.**

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See **EVIDENCE.**

APPEAL.

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See **PRACTICE AND PLEADING.**

APPEARANCE TERM.

See **PRACTICE AND PLEADING.**

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See **PRACTICE AND PLEADING.**

ASSIGNMENT.

Negotiable paper. Notice to payor not necessary. The assignment of negotiable paper to a third person, as collateral security for a pre-existing liability, is valid, and the equity of the assignee is superior to that of a subsequent attaching creditor. Notice of the assignment, to the payor of the note, is not necessary to perfect the right of the assignee. *Sugg v. Powell*, 221.

See **ADMINISTRATOR. CONSIDERATION.**

ATTACHMENT.

1. *Prior equity. Fund in the hands of a creditor.* A person having a debt against another, and being in debt to him a larger amount, can not collect the amount due him until the debt due his creditor is paid. A creditor of such person occupies no higher ground, and cannot, by attachment, subject the debt due from such person to the satisfaction of his claim, until the debt due the former is paid. *Arledge v. White*, 241.
2. *First attachment holds.* If a person attaches a fund in his hands belonging to his debtor, his attachment will have priority over a subsequent attaching creditor. *Ibid.*
3. *What a sufficient levy of.* The attachment writ came to the hands of the sheriff, who proceeded to levy the same on the property specified in the bill and writ. He endorsed the day the writ came to his hands, wrote out his levy and returned it with the writ, but neglected to sign his name to it until after the return, and after he went out of office. It is held, that this was a good levy, and gave the first attaching creditor *priority* of satisfaction over subsequent attaching creditors, whose levies were more formal. *Lea v. Maxwell*, 865.
4. *Admission of a levy in the bill. Estoppel.* If a subsequent attaching creditor admit in his bill, that an attachment had been issued at the suit of another creditor, and levied, and the property placed in the custody of the law, such creditor is *estopped* to deny the validity of the levy of the first attachment. *Ibid.*
5. *Deed of trust. Purchase of the trust property.* If property is conveyed by deed of trust to secure a debt, and a third person purchase said property, of the maker of the deed, subject to the trust in favor of the *beneficiaries*, such purchase extinguishes the right of the debtor, and a subsequent attaching creditor acquires no *lien* upon the property. *Williams v. Whoples*, 401.

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See CRIMINAL LAW.

BANKS.

Contract by. President and cashier. Custom. In an action against a bank to recover the amount of a draft drawn and signed by its president, with acceptance waived, it appeared that no special authority was delegated to that officer to draw checks, by the charter, but that such duty, by the general custom of other banks, devolved upon the cashier, except in the absence of that officer, when the duty was performed by the president; that such also had been the usage of the bank in this case, and that in the absence of the regular cashier, but while a temporary cashier was discharging his duties, the draft in question had been

drawn and signed by the president; and it is held that the bank was liable for the payment of the draft. *Neiffer v. The Bank of Knoxville*, 162.

See CHANCERY. CORPORATION.

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See STATUTE OF LIMITATIONS.

BILLS AND NOTES.

1. *Non est factum*. *Bill single, originally void. Re-delivery*. In order to bind a party on the ground of a re-delivery of a deed originally void, it must appear that by such supposed re-delivery the party has done some act equivalent to the execution of a new deed, or that by some act or declaration he has acknowledged and re-delivered a writing which was before impeachable and invalid, intending thereby to make it his deed. The action or declaration of the party must be unequivocal, clearly indicating the intention of the party to adopt the paper as his own, and to assume the liability it imposes. *McNutt v. McMahan*, 96.
2. *Same. Same*. On the trial of an issue upon the plea of *non est factum*, it appeared that defendant had placed his signature and seal to a paper in blank as security for another which was afterwards filled up in the absence of defendant. That defendant afterwards called upon the party having custody of the paper, and asked permission to look at his "note;" that, after inspecting it, and taking a memorandum of the date and amount, he observed that he was bound for the principal in a large amount of money, and then returned the paper to the holder; and it is held, that this was not such an acknowledgment and re-delivery as would bind the defendant. *Ibid*.
3. *Transfer by delivery. When disposed of by the assignee*. If one person accept a bill of exchange for the accommodation of another, and before its maturity such person delivers to the acceptor notes in the place of money, with an unlimited discretion to make such disposition of them as might be thought proper to enable him to meet the payment of the bill soon falling due; and upon the maturity of the bill, the acceptor, not having made any disposition of the notes, pays the same; he can make a valid disposition of said notes to reimburse himself the amount paid out of his own funds. *Dortch v. Frasier*, 243.

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BOOK DEBT.

See EVIDENCE.

BOUNDARY.

1. *Statute of limitations. Act of 1819, § 1.* If, at the time of the execution of a deed, the lines are marked, and the boundary thus made varies from the lines of the previous conveyances under which the bargainor claims title; and the lines marked are known and recognized by the parties as the true boundary of the land, an adverse possession of such land for a period of seven years, claiming up to the new boundary thus made, will vest an estate in fee in the conveyee. *Mayse v. Lafferty*, 60.
2. *Re-marking. Case in judgment.* A party cannot, by an *ex parte* survey and marking of the lines, fix the boundary of his land different from that called for in his deed. Thus, in 1809, the plaintiff and his vendor surveyed and marked the lines of the land claimed by him. This survey was made without the knowledge of the adjoining owners, and was a departure from the calls of the deed. It is held, that the deed controlled the boundary, and that the plaintiff is not entitled to hold the land included by his survey. *Woodfolk v. Cornwell*, 272.
3. *Burying ground reserved and boundary not defined.* In the sale of a tract of land the plaintiff made this exception in the deed: "A small lot reserved for a burying ground, two poles square, around the graves where the said William Hodge and his grand-children are now buried." The deed contained no other description of the land reserved. *Held*, that the law would fix the boundary of the reserved lot, by making the graves which were there when the conveyance was made, a common centre, from which, by lines equally extended each way, an area of two poles square is to be laid off. *Hodge v. Blanton*. 560.

See EVIDENCE. ESTOPPEL.

CASE.

See DAMAGES. SLAVES.

CERTIORARI AND SUPERSEDEAS.

1. *Dismissal of the petition. Judgment for 12½ per cent. interest.* Code, § 8137. Upon the dismissal of the petition for writs of *certiorari* and *supersedeas*, in which the judgment of the justice is complained of, and errors therein sought to be corrected, the plaintiff is entitled, under § 8137 of the Code, to a judgment against the defendant and his surety to the prosecution bond for the amount of the justice's judgment, with interest, at the rate of 12½ per cent. per annum, from its date, and costs. *Allen v. Wood*, 438.
2. *Cause must be brought up to the next term of the Circuit Court.* A petition for a writ of *certiorari* to remove a cause from before a jus-

tice of the peace to the Circuit Court, must be filed before the next term of the Court, after the rendition of the justice's judgment, and the cause brought up to that term, or a sufficient reason shown for not doing so. *Lanier & Brother v. Sullivan*, 440.

3. *Judgment upon the dismissal of the petition.* Code § 3138. Prior to the adoption of the Code, it was the practice, where the writ of *certiorari* was used to quash the execution because of some matter arising subsequent to the judgment, to award, upon a dismissal of the petition, a *procedendo* to the justice of the peace, to proceed to execution upon the judgment before him. This practice is changed by § 3138 of the Code, and a direct judgment is to be given by the Circuit Court against the principal and security in the prosecution bond, for the amount of the recovery, with interest and costs. *Mallett v. Hutchinson*, 558.

4. *Granted in open Court.* It is in time, if the application for writs of *certiorari* and *supersedeas* is made in open Court, at the next term after the rendition of the justice's judgment, and a sufficient legal reason shown for not appealing. *Nance v. Hicks*, 624.

5. *Same. Counter affidavits.* Upon a motion to dismiss a petition for writs of *certiorari* and *supersedeas*, counter affidavits controverting the truth of its statements are not admissible. *Ibid.*

See PRINCIPAL AND AGENT.

CHANCERY.

1. *Ignorance of Law. Application of the principle.* The maxim that ignorance of the law is no excuse for the breach, or nonperformance of an agreement, applies, *alone*, to general public laws, which prescribe a rule of action for the whole community; and has no application to special or private acts, which are only intended to operate upon particular individuals. Nor does it apply to foreign laws, or to the laws of the other States of the Union. Ignorance of those laws is deemed to be ignorance of *fact*. *King v. Doolittle*, 77.
2. *Same. Same. Bank charters.* In the application of this legal maxim, a private Bank Charter, which is merely the *title* of the parties, stands upon the footing of special, or private acts; foreign laws, and the laws of the other States of the Union. *Ibid.*
3. *Same. Same. Confined to cases of pure, unmixed mistake of law.* This highly artificial and rigid doctrine is confined to cases of pure, unmixed mistake of law, in which there is no mistake of *fact*, no trust, or element of fraud entering in, and conducing to the making of the contract. *Ibid.*
4. *Mistake of fact. When a Court of Equity will relieve against.* If a contract is entered into in good faith, by which it is mutually under-

stood and intended, for an adequate consideration, the one party shall part with, and the other acquire a valid title to property: and it turns out that, at the time of the contract, by the operation of some settled principle of law of which they were alike ignorant, the supposed title is wholly valueless, or did not, in legal contemplation, exist. in such case, the mistake is not a mere mistake of law; it involves, in some measure, a mistake of fact, as well as of law; and a Court of Equity will replace the parties in *statu quo*. *Ibid.*

5. *Same. Same. Fraud not necessary to relief.* In cases of mutual mistake going to the essence of the contract, it is not necessary that there should be any element of fraud to warrant the interposition of a Court of Equity. Relief will be granted on the ground of mutual mistake, as to the existence of the thing which constituted the basis of the contract. *Ibid.*
6. *When negotiable paper subject to equities, in the hands of the endorsee.* The transfer of negotiable paper in payment of, or as a security for a pre-existing debt, is not a transfer in the due course of trade, so as to protect the paper in the hands of the holder from the equities, to which it was subject, between the original parties. *Ibid.*
7. *Same. Lex loci contractus, governs. Pennsylvania.* The right of parties is to be governed by the law of the place where the contract is made. In this case, the contract of endorsement was made in Pennsylvania; and, although the course of judicial decision in that State, as to the equities to which negotiable paper is subject in the hands of the endorsee, is different from ours; yet, it is settled by her Courts, that the transfer of the note of a third person, as collateral security for a pre-existing debt, without a new consideration, will not place the person to whom it is transferred, in the condition of a holder for value, so as to protect him against the equities subsisting between the original parties. *Ibid.*
8. *Evidence. Effect of order pro confesso.* An order *pro confesso* against a defendant to a bill in Chancery, has the effect of an answer admitting the allegations of the bill to be true. *Stone. Adm'r, v. Duncan, 103.*
9. *Discovery. Evidence.* If parties reduce the terms of their contract to writing, and it is left with one of them to copy for the purpose of being executed, which, through inadvertence, is omitted to be done, and a suit at law is brought by one of the parties to said contract, the other party is entitled to a discovery by bill in Chancery, as to the identity of the paper thus prepared, and as to whether it contains the terms of the contract as agreed upon, to be used as evidence in the trial at law. *Elliston v. Hughes, 225.*
10. *Deeds. Reformed for fraud or mistake.* It is a general principle, alike applicable at law and in equity, that a deed must be held to con-

tain the true and full contract of the parties, and parol proof cannot be heard to change or reform it; but this general rule does not apply to cases of fraud or mistake in the execution of the deed. A Court of Chancery has power to reform and correct errors in deeds, produced by fraud or mistake. *Barnes v. Gregory*, 280.

11. *Same. Sale in gross and by the acre.* A sale of land in gross, in the absence of fraud, is binding upon the parties as to quantity; but if the sale is by the acre, and it turns out that there is a mistake as to the number of acres settled for, either party may have the mistake corrected, and an abatement or increase of the price, for the deficiency or overplus in the quantity sold. *Ibid.*

See SALE OF REAL ESTATE.

CHANCERY JURISDICTION.

1. *Contract. Corporation.* The Legislature granted to the complainant a charter to build a turnpike road, which was forfeited by reason of noncompliance with the terms thereof. After said forfeiture, the defendant obtained a charter to construct a road upon the road-bed indicated in the complainant's charter, subject to the condition that the complainant's work under the prior charter should be valued, and its value set apart to him in stock in the new company. Upon the organization of the new company the complainant became a stockholder accordingly, but no money was paid on account of the new enterprise by any subscriber, and that charter was also forfeited. The complainant, thereupon, filed his bill to compel the new company to contribute and pay to him the amount and value of his work so converted into stock; and it is held that he cannot recover. *Hopkins, Adm'r, v. Whitesides*, 31.
2. *Jurisdiction. Remedy at law.* If a person has a perfect remedy at law, of which he is not deprived by fraud, or accident, or the act of the opposite party, a Court of Chancery cannot grant him relief. *Graham v. Roberts and Wright*, 50.
3. *Jurisdiction. Execution. Sale of a remainder, or reversionary interest in realty.* A remainder, or reversionary interest in real estate, can be sold by an execution at law. A bill in Chancery is not necessary to reach such interest, and will be dismissed upon demurrer. The remedy at law is complete, and the Chancery Court has no jurisdiction. *Wiley v. Bridgman*, 68.
4. *Same. Waiver of jurisdiction. Act of 1852, ch. 365.* Although a demand may be, purely, a legal one, an order *pro confesso*, or an answer to the merits, is a waiver, under the act of 1852, ch. 365, of the question of jurisdiction. *Ibid.*
4. *Judgment. Service of process.* If a judgment is rendered against a party without service of process upon him, and by reason thereof

he does not appear, or make defence to the action, a Court of Chancery will enjoin such judgment; and it is not necessary to relief in such a case, to show that a valid defence could have been made by the party if he had been summoned. *Bell v. Williams Adm'r*, 229.

See PRINCIPAL AND AGENT.

CHANCERY PLEADING.

1. *Demurrer. Original and amended bill.* If a demurrer is too broad it loses its effect. Hence, if a general demurrer is filed to an original and amended bill, and the original is defective and demurrable, yet the amended bill is not, the demurrer will not be sustained as to either. *Fay v. Jones*, 442.
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CHANCERY PRACTICE.

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15. *Same. Same. Same. Same. Husband and wife.* The act of 1827 was, for convenience, intended to act by divestiture of title by decree, and it chooses to repose some confidence in the conjugal relation, and not to regard husband and wife as occupying such an antagonism as will prevent their being joined in a petition for the sale of land descended to her, and in proceedings under said act, the privy examination of the wife is not necessary to pass the title. An omission, therefore, to make the wife a defendant, or to cause her privy examination to be taken, is not error apparent for which a bill of review will lie. *Ibid.*
16. *Same. Same. Sale of an undivided interest.* The sale of an undivided interest in land is not such an error upon the face of the proceedings as will make the sale void, and the same will not be annulled on review. Such a mode of sale would not be favored upon appeal or writ of error, but does not furnish sufficient ground for a bill of review. *Ibid.*
17. *Same. Same. Facts stated in the decree.* Upon a bill of review the evidence in a cause can not be looked to, beyond the decree; and

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ABATEMENT.

By death. Motion to revive. An appeal in the nature of a writ of error merely suspends the judgment of the inferior Court, and does not annul it. If, therefore, the plaintiff in an action for an assault and battery, dies, after an appeal in error by the defendant, it is not only the right, but likewise the duty of the personal representative to revive the suit in the Superior Court. *Kimbrough v. Mitchell*, 589.

See CRIMINAL LAW.

ACTION.

Discontinuance of. If a party permit a *chasm* in the proceedings to occur, by failing to continue the process regularly from term to term, until service on the defendant, it operates as a *discontinuance* of his suit. *Armstrong v. Harrison*, 379.

ACCOMMODATION ENDORSER.

See SUMMARY PROCEEDINGS.

ADMINISTRATION.

Debt due from an heir. Assignment of interest. If an heir of an estate is indebted to the deceased in a sum which cannot otherwise be made, the administrator, by proper proceedings, may subject the interest of such heir in the real estate, to the payment of said indebtedness. But if said heir has *bona fide* transferred his interest in the estate to an innocent party, the debt not being a lien upon such interest, it cannot be subjected to the satisfaction of said indebtedness. *Towles v. Towles*, 601.

See PRACTICE AND PLEADING. ABATEMENT. ADVANCEMENT.

ADMINISTRATORS AND EXECUTORS.

See ADMINISTRATION. PRACTICE AND PLEADING. ABATEMENT.

ADVANCEMENT.

Notes held by the intestate. Case in judgment. Notes held by the father at the time of his death, against a son, are not to be charged as an advancement, unless it be proved that they were used merely as evidences of a gift or advancements to the son, or that the father did not intend to collect them. The intestate held several notes on an insolvent son. The son died before the father, leaving children. The notes came to the hands of the administrator without any evidence explaining the intention of the intestate, as to whether he held them as debts, or intended them as gifts to his son. Held, that *prima facie* they are debts, and cannot be charged as advancements, in the absence of proof showing that the deceased did not intend to collect them, or regarded them as gifts to his son. *Vaden, Adm'r, v. Hance, 800.*

AFFIDAVIT.

See CERTIORARI AND SUPERSEDEAS.

ANSWER.

See EVIDENCE.

APPEAL.

Effect of. Upon an appeal from a justice's judgment, the cause is not before the Circuit Court for revision, as on a writ of error, but for trial *de novo* upon the merits, and regardless of defects in the judgment of the justice, the Court should proceed to hear the case, and render judgment according to the merits. *Allen v. Wood, 486.*

See PRACTICE AND PLEADING.

APPEARANCE TERM.

See PRACTICE AND PLEADING.

ARBITRATION.

See PRACTICE AND PLEADING.

ASSIGNMENT.

Negotiable paper. Notice to payor not necessary. The assignment of negotiable paper to a third person, as collateral security for a pre-existing liability, is valid, and the equity of the assignee is superior to that of a subsequent attaching creditor. Notice of the assignment, to the payor of the note, is not necessary to perfect the right of the assignee. *Sugg v. Powell, 221.*

See ADMINISTRATOR. CONSIDERATION.

ATTACHMENT.

1. *Prior equity. Fund in the hands of a creditor.* A person having a debt against another, and being in debt to him a larger amount, can not collect the amount due him until the debt due his creditor is paid. A creditor of such person occupies no higher ground, and cannot, by attachment, subject the debt due from such person to the satisfaction of his claim, until the debt due the former is paid. *Arledge v. White*, 241.
2. *First attachment holds.* If a person attaches a fund in his hands belonging to his debtor, his attachment will have priority over a subsequent attaching creditor. *Ibid.*
3. *What a sufficient levy of.* The attachment writ came to the hands of the sheriff, who proceeded to levy the same on the property specified in the bill and writ. He endorsed the day the writ came to his hands, wrote out his levy and returned it with the writ, but neglected to sign his name to it until after the return, and after he went out of office. It is held, that this was a good levy, and gave the first attaching creditor *priority of satisfaction* over subsequent attaching creditors, whose levies were more formal. *Lea v. Maxwell*, 865.
4. *Admission of a levy in the bill. Estoppel.* If a subsequent attaching creditor admit in his bill, that an attachment had been issued at the suit of another creditor, and levied, and the property placed in the custody of the law, such creditor is *estopped* to deny the validity of the levy of the first attachment. *Ibid.*
5. *Deed of trust. Purchase of the trust property.* If property is conveyed by deed of trust to secure a debt, and a third person purchase said property, of the maker of the deed, subject to the trust in favor of the *beneficiaries*, such purchase extinguishes the right of the debtor, and a subsequent attaching creditor acquires no *lien* upon the property. *Williams v. Whoples*, 401.

AUTREFOIS CONVICT.

See CRIMINAL LAW.

BANKS.

Contract by. President and cashier. Custom. In an action against a bank to recover the amount of a draft drawn and signed by its president, with acceptance waived, it appeared that no special authority was delegated to that officer to draw checks, by the charter, but that such duty, by the general custom of other banks, devolved upon the cashier, except in the absence of that officer, when the duty was performed by the president; that such also had been the usage of the bank in this case, and that in the absence of the regular cashier, but while a temporary cashier was discharging his duties, the draft in question had been

drawn and signed by the president; and it is held that the bank was liable for the payment of the draft. *Neiffer v. The Bank of Knoxville*, 162.

See CHANCERY. CORPORATION.

BAILOR AND BAILEE.

See STATUTE OF LIMITATIONS.

BILLS AND NOTES.

1. *Non est factum*. *Bill single, originally void. Re-delivery*. In order to bind a party on the ground of a re-delivery of a deed originally void, it must appear that by such supposed re-delivery the party has done some act equivalent to the execution of a new deed, or that by some act or declaration he has acknowledged and re-delivered a writing which was before impeachable and invalid, intending thereby to make it his deed. The action or declaration of the party must be unequivocal, clearly indicating the intention of the party to adopt the paper as his own, and to assume the liability it imposes. *McNutt v. McMahan*, 96.
2. *Same. Same*. On the trial of an issue upon the plea of *non est factum*, it appeared that defendant had placed his signature and seal to a paper in blank as security for another which was afterwards filled up in the absence of defendant. That defendant afterwards called upon the party having custody of the paper, and asked permission to look at his "note;" that, after inspecting it, and taking a memorandum of the date and amount, he observed that he was bound for the principal in a large amount of money, and then returned the paper to the holder; and it is held, that this was not such an acknowledgment and re-delivery as would bind the defendant. *Ibid*.
3. *Transfer by delivery. When disposed of by the assignee*. If one person accept a bill of exchange for the accommodation of another, and before its maturity such person delivers to the acceptor notes in the place of money, with an unlimited discretion to make such disposition of them as might be thought proper to enable him to meet the payment of the bill soon falling due; and upon the maturity of the bill, the acceptor, not having made any disposition of the notes, pays the same; he can make a valid disposition of said notes to reimburse himself the amount paid out of his own funds. *Dortch v. Frasier*, 243.

BILL OF REVIEW.

See CHANCERY PRACTICE.

BOOK DEBT.

See EVIDENCE.

BOUNDARY.

1. *Statute of limitations. Act of 1819, § 1.* If, at the time of the execution of a deed, the lines are marked, and the boundary thus made varies from the lines of the previous conveyances under which the bargainor claims title; and the lines marked are known and recognized by the parties as the true boundary of the land, an adverse possession of such land for a period of seven years, claiming up to the new boundary thus made, will vest an estate in fee in the conveyee. *Mayse v. Lafferty*, 60.
2. *Re-marking. Case in judgment.* A party cannot, by an *ex parte* survey and marking of the lines, fix the boundary of his land different from that called for in his deed. Thus, in 1809, the plaintiff and his vendor surveyed and marked the lines of the land claimed by him. This survey was made without the knowledge of the adjoining owners, and was a departure from the calls of the deed. It is held, that the deed controlled the boundary, and that the plaintiff is not entitled to hold the land included by his survey. *Woodfolk v. Cornwell*, 272.
8. *Burying ground reserved and boundary not defined.* In the sale of a tract of land the plaintiff made this exception in the deed: "A small lot reserved for a burying ground, two poles square, around the graves where the said William Hodge and his grand-children are now buried." The deed contained no other description of the land reserved. *Held*, that the law would fix the boundary of the reserved lot, by making the graves which were there when the conveyance was made, a common centre, from which, by lines equally extended each way, an area of two poles square is to be laid off. *Hodge v. Blanton*, 560.

See EVIDENCE. ESTOPPEL.

CASE.

See DAMAGES. SLAVES.

CERTIORARI AND SUPERSEDEAS.

1. *Dismissal of the petition. Judgment for 12½ per cent. interest. Code, § 3187.* Upon the dismissal of the petition for writs of *certiorari* and *supersedeas*, in which the judgment of the justice is complained of, and errors therein sought to be corrected, the plaintiff is entitled, under § 3187 of the Code, to a judgment against the defendant and his surety to the prosecution bond for the amount of the justice's judgment, with interest, at the rate of 12½ per cent. per annum, from its date, and costs. *Allen v. Wood*, 438.
2. *Cause must be brought up to the next term of the Circuit Court.* A petition for a writ of *certiorari* to remove a cause from before a jus-

tice of the peace to the Circuit Court, must be filed before the next term of the Court, after the rendition of the justice's judgment, and the cause brought up to that term, or a sufficient reason shown for not doing so. *Lanier & Brother v. Sullivan*, 440.

8. *Judgment upon the dismissal of the petition.* Code § 3138. Prior to the adoption of the Code, it was the practice, where the writ of *certiorari* was used to quash the execution because of some matter arising subsequent to the judgment, to award, upon a dismissal of the petition, a *procedendo* to the justice of the peace, to proceed to execution upon the judgment before him. This practice is changed by § 3138 of the Code, and a direct judgment is to be given by the Circuit Court against the principal and security in the prosecution bond, for the amount of the recovery, with interest and costs. *Mallett v. Hutchinson*, 558.

4. *Granted in open Court.* It is in time, if the application for writs of *certiorari* and *supersedeas* is made in open Court, at the next term after the rendition of the justice's judgment, and a sufficient legal reason shown for not appealing. *Nance v. Hicks*, 624.

5. *Same. Counter affidavits.* Upon a motion to dismiss a petition for writs of *certiorari* and *supersedeas*, counter affidavits controverting the truth of its statements are not admissible. *Ibid.*

See PRINCIPAL AND AGENT.

CHANCERY.

1. *Ignorance of Law. Application of the principle.* The maxim that ignorance of the law is no excuse for the breach, or nonperformance of an agreement, applies, *alone*, to general public laws, which prescribe a rule of action for the whole community; and has no application to special or private acts, which are only intended to operate upon particular individuals. Nor does it apply to foreign laws, or to the laws of the other States of the Union. Ignorance of those laws is deemed to be ignorance of fact. *King v. Doolittle*, 77.

2. *Same. Same. Bank charters.* In the application of this legal maxim, a private Bank Charter, which is merely the title of the parties, stands upon the footing of special, or private acts; foreign laws, and the laws of the other States of the Union. *Ibid.*

3. *Same. Same. Confined to cases of pure, unmixed mistake of law.* This highly artificial and rigid doctrine is confined to cases of pure, unmixed mistake of law, in which there is no mistake of fact, no trust, or element of fraud entering in, and conducing to the making of the contract. *Ibid.*

4. *Mistake of fact. When a Court of Equity will relieve against.* If a contract is entered into in good faith, by which it is mutually under-

stood and intended, for an adequate consideration, the one party shall part with, and the other acquire a valid title to property: and it turns out that, at the time of the contract, by the operation of some settled principle of law of which they were alike ignorant, the supposed title is wholly valueless, or did not, in legal contemplation, exist. In such case, the mistake is not a mere mistake of law; it involves, in some measure, a mistake of fact, as well as of law; and a Court of Equity will replace the parties in *statu quo*. *Ibid.*

5. *Same. Same. Fraud not necessary to relief.* In cases of mutual mistake going to the essence of the contract, it is not necessary that there should be any element of fraud to warrant the interposition of a Court of Equity. Relief will be granted on the ground of mutual mistake, as to the existence of the thing which constituted the basis of the contract. *Ibid.*
6. *When negotiable paper subject to equities, in the hands of the endorsee.* The transfer of negotiable paper in payment of, or as a security for a pre-existing debt, is not a transfer in the due course of trade, so as to protect the paper in the hands of the holder from the equities, to which it was subject, between the original parties. *Ibid.*
7. *Same. Lex loci contractus, governs. Pennsylvania.* The right of parties is to be governed by the law of the place where the contract is made. In this case, the contract of endorsement was made in Pennsylvania; and, although the course of judicial decision in that State, as to the equities to which negotiable paper is subject in the hands of the endorsee, is different from ours; yet, it is settled by her Courts, that the transfer of the note of a third person, as collateral security for a pre-existing debt, without a new consideration, will not place the person to whom it is transferred, in the condition of a holder for value, so as to protect him against the equities subsisting between the original parties. *Ibid.*
8. *Evidence. Effect of order pro confesso.* An order *pro confesso* against a defendant to a bill in Chancery, has the effect of an answer admitting the allegations of the bill to be true. *Stone. Adm'r, v. Duncan, 103.*
9. *Discovery. Evidence.* If parties reduce the terms of their contract to writing, and it is left with one of them to copy for the purpose of being executed, which, through inadvertence, is omitted to be done, and a suit at law is brought by one of the parties to said contract, the other party is entitled to a discovery by bill in Chancery, as to the identity of the paper thus prepared, and as to whether it contains the terms of the contract as agreed upon, to be used as evidence in the trial at law. *Elliston v. Hughes, 225.*
10. *Deeds. Reformed for fraud or mistake.* It is a general principle, alike applicable at law and in equity, that a deed must be held to con-

tain the true and full contract of the parties, and parol proof cannot be heard to change or reform it; but this general rule does not apply to cases of fraud or mistake in the execution of the deed. A Court of Chancery has power to reform and correct errors in deeds, produced by fraud or mistake. *Barnes v. Gregory*, 280.

11. *Same. Sale in gross and by the acre.* A sale of land in gross, in the absence of fraud, is binding upon the parties as to quantity; but if the sale is by the acre, and it turns out that there is a mistake as to the number of acres settled for, either party may have the mistake corrected, and an abatement or increase of the price, for the deficiency or overplus in the quantity sold. *Ibid.*

See SALE OF REAL ESTATE.

CHANCERY JURISDICTION.

1. *Contract. Corporation.* The Legislature granted to the complainant a charter to build a turnpike road, which was forfeited by reason of noncompliance with the terms thereof. After said forfeiture, the defendant obtained a charter to construct a road upon the road-bed indicated in the complainant's charter, subject to the condition that the complainant's work under the prior charter should be valued, and its value set apart to him in stock in the new company. Upon the organization of the new company the complainant became a stockholder accordingly, but no money was paid on account of the new enterprise by any subscriber, and that charter was also forfeited. The complainant, thereupon, filed his bill to compel the new company to contribute and pay to him the amount and value of his work so converted into stock; and it is held that he cannot recover. *Hopkins, Adm'r, v. Whitesides*, 81.
2. *Jurisdiction. Remedy at law.* If a person has a perfect remedy at law, of which he is not deprived by fraud, or accident, or the act of the opposite party, a Court of Chancery cannot grant him relief. *Graham v. Roberts and Wright*, 56.
3. *Jurisdiction. Execution. Sale of a remainder, or reversionary interest in realty.* A remainder, or reversionary interest in real estate, can be sold by an execution at law. A bill in Chancery is not necessary to reach such interest, and will be dismissed upon demurrer. The remedy at law is complete, and the Chancery Court has no jurisdiction. *Wiley v. Bridgman*, 68.
4. *Same. Waiver of jurisdiction. Act of 1852, ch. 365.* Although a demand may be, purely, a legal one, an order *pro confesso*, or an answer to the merits, is a waiver, under the act of 1852, ch. 365, of the question of jurisdiction. *Ibid.*
4. *Judgment. Service of process.* If a judgment is rendered against a party without service of process upon him, and by reason thereof

he does not appear, or make defence to the action, a Court of Chancery will enjoin such judgment; and it is not necessary to relief in such a case, to show that a valid defence could have been made by the party if he had been summoned. *Bell v. Williams Adm'r*, 229.

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9. *Fame. Same. Parties. Husband and wife.* A *feme covert* or other person laboring under a disability, is not bound to wait until the removal of such disability, before filing a bill of review. If an antagonism exists between the interests of husband and wife, or if he has lost his right by *laches*, and thereby placed himself in an attitude where he cannot join his wife in the suit—her rights remaining in full force—she may file a bill of review by next friend, making her husband a defendant. *Ibid.*
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13. *Same. Same. Knowledge of agents or representatives.* Representation in Courts of Justice is a necessity of civilized society, and the acts or neglects of the representative must, in some degree, be binding upon the party represented. And persons under disability at the time of a judicial proceeding to which they are parties, represented by their guardians and agents, are bound upon the knowledge of such guardians and agents. *Ibid.*
14. *Same. Errors apparent in the decree. Sale of land. Act of 1827.* It is error to file a petition for the sale of land, embracing adults, married women and their husbands, and minors, together. The proper mode of proceeding under the act of 1827, where minors are interested, is, by bill *inter partes*, making the minors defendants. A proceeding, however, by petition, under the act of 1827, is not void, and it is not error for which a bill of review will lie. *Ibid.*
15. *Same. Same. Same. Same. Husband and wife.* The act of 1827 was, for convenience, intended to act by divestiture of title by decree, and it chooses to repose some confidence in the conjugal relation, and not to regard husband and wife as occupying such an antagonism as will prevent their being joined in a petition for the sale of land descended to her, and in proceedings under said act, the privy examination of the wife is not necessary to pass the title. An omission, therefore, to make the wife a defendant, or to cause her privy examination to be taken, is not error apparent for which a bill of review will lie. *Ibid.*
16. *Same. Same. Sale of an undivided interest.* The sale of an undivided interest in land is not such an error upon the face of the proceedings as will make the sale void, and the same will not be annulled on review. Such a mode of sale would not be favored upon appeal or writ of error, but does not furnish sufficient ground for a bill of review. *Ibid.*
17. *Same. Same. Facts stated in the decree.* Upon a bill of review the evidence in a cause can not be looked to, beyond the decree; and

the statement in the decree, that "the Court being satisfied of the truth of said petition, and that it is for the manifest advantage of the heirs that said lands be sold, is equivalent to the statement that it appeared to the Court that the facts stated, &c., were true, and is a sufficient statement of the facts under the rules of chancery practice and under the act of 1827. *Ibid.*

18. *Same. Same. Lands without the chancery district.* If any portion of the lands sought to be sold, lie within the chancery district, the Court has jurisdiction to order the sale of the entire lands, although situated in different counties in the State. Hence, a decree for the sale of lands in counties not embraced in the chancery district, is not void, and a bill of review will not lie. *Ibid.*

19. *Same. Day in Court.* The doctrine that a party under a disability is entitled to a day in Court, has no application where title is divested by decree, but only where the party is directed to convey. In this case it was no error not to give the infants a day in Court. *Ibid.*

20. *Same. Parties.* If the parties in interest are not made parties to the petition, they are not bound by the proceedings, and an original bill, in the nature of a bill of review, will lie; but the form of making them parties is not material—whether mentioned in the caption, or represented as petitioners, and the names placed at the end of the petition. *Ibid.*

21. *Same. How far the title of purchasers affected.* It may be laid down as a general rule, that whenever a Court of Chancery, or other Court of general jurisdiction, possesses jurisdiction of the subject matter of litigation, and has acquired jurisdiction of the parties, that, as to third persons interested under its judgments and decrees, its proceedings cannot be held to be void after a final disposition of a cause. And in this respect, it is not material whether the jurisdiction be inherent or statutory, provided the statute be of a general or public nature. *Ibid.*

See EVIDENCE.

CHARGE TO THE JURY.

See CIRCUIT COURT.

CIRCUIT COURT.

1. *Charge to the jury.* The instructions of the Court to the jury should be confined to the case made out in the proof, otherwise the jury might be misled by an abstract principle, which, though correct, has no application to the facts proved; but if there is testimony tending

to raise the question, it is not the province of the Court to determine whether it is sufficient. The Court should state the law, and leave to the jury the determination of the effect of the evidence. *Goodall v. Thurman*, 209.

2. *Charge to the jury.* In trials by jury, the Court is to decide questions of law, and the jury, questions of fact. What are called mixed questions, consisting of both law and fact, as questions in respect to the degree of care, skill, diligence, &c., required by law in particular cases, are to be submitted to the jury under proper instructions from the Court, as to the rules and principles of law by which they are to be governed in their determination of the case. The principles of law by which the jury must be governed in finding a verdict, cannot be left to their arbitrary determination. They must be settled by the Court, and this may be done in one of two modes; either the Court must inform the jury, hypothetically, whether or not the facts which the evidence tends to prove will, if established in the opinion of the jury, satisfy the allegations in the pleadings; or, the jury must find the facts specially, and then the Court will apply the law, and pronounce whether or not the facts so found are sufficient to support the averments of the parties. *Whirley v. Whiteman*, 610.

COMMON CARRIER.

See PRACTICE AND PLEADING.

COMPETENCY.

See EVIDENCE.

CODE CITED AND CONSTRUED.

Section, 8187, Certiorari and Supersedeas,	-	-	-	438
“ 8138, Judgement,	-	-	-	558
“ 2918, Cross-action,	-	-	-	265
“ 5097, Prosecutor,	-	-	-	389

CONSIDERATION.

- 1 *Failure and want of. Cross-action. Act of 1856, ch. 71. Code § 2918.* By the act of 1856, ch. 71, which, in substance, is incorporated into the Code, § 2918, a defendant, may, by way of defence, avail himself of any matter arising out of the plaintiff's demand, for which he is entitled to recover in a cross-action. He may, also, avail himself of any matter growing out of the original consideration of any written instrument, whether with or without seal, for which he is entitled to maintain a cross-action. *Ford v. Thompson*, 265.
2. *Same. Defence to in the hands of an assignee.* This right of defence exists equally against the assignee of the original party, when the demand has passed into his hands, subject to the equities by which was affected in the possession of the assignee. *Ibid.*

3. If a commissioner, under an order of Court, sells slaves, and, upon receipt of the purchase money, warrants the title and soundness of said slaves, a sufficient consideration passes to support the warranty. *Kearley v. Duncan*, 397.
4. *Failure of. Sale of land. Fraud.* If a note or bill single is executed to secure the payment of a part of the consideration money of a tract of land, and the vendor executes his title bond, obligating himself to make to the purchaser a deed in *fee simple*, when the purchase money is paid, and at the time of the sale the vendor had neither a legal or equitable title to the land, knew that fact, and concealed it from the vendee, there is a failure of the consideration of said note; and the concealment of the true condition of the title, is a fraud upon the vendee, and the payment of the note cannot be enforced. *Mullins v. Jones*, 517.
5. *Assignment of the note. Rights of the Assignee.* The assignee of said note, with a full knowledge of the failure of the consideration and the fraud of the vendor, stands in the condition of the vendor, and the consideration thereof may be inquired into as well as the fraud, in his hands. *Ibid.*

See CONTRACT. COVENANT. WARRANTY.

CONSTABLE.

1. *Bond. Liability of sureties.* If a person whose term of office as constable has not expired, is a candidate for re-election at the regular March election, and is successful, and enters into bond with security before the Court, such bond is good at common law, and being a good common law bond, is a good statutory one, and the securities are liable upon the same. *State for the use of. Burns v. Clark*, 369.
2. *Question reserved.* As to the effect of the second election, in case another had been elected, and a contest existed for the office, or between others, as to their official acts; or if an act performed after the expiration of two years from the first election should come in question, is reserved. *Ibid.*
3. *Stay of execution.* A constable, by giving his receipt for the collection of a note becomes, *individually*, the agent of the owner of said note; but this does not confer upon him authority to dispense with the stay of execution upon the judgment before the justice of the peace, so as to prevent the plaintiff from taking his execution immediately, if the judgment is not legally stayed. *Mallett v. Hutchinson*, 558.

CONSTITUTIONAL LAW.

Town charters granted by the County Court. Const., art. 11, § 7. Acts of 1849, ch. 17, and 1856, ch. 254. The act of 1849. ch. 17, authorizing

the County Courts, upon certain conditions, to create town corporations, is a valid and constitutional enactment. *Mayor and Aldermen of Morristown, v. Shelton*, 24.

CONSTRUCTION.

See GIFT. HUSBAND AND WIFE. TRUST AND TRUSTEE. WILL.

CONTINUANCE.

In the discretion of the Court. Continuances are in the discretion of the Court below, and the action of the inferior Courts in granting or refusing continuances, will not be reversed unless it *clearly* appear that there has been a *very great abuse* of this discretion. *Pitts v. Gilliam*, 549.

See CRIMINAL LAW.

CONTRACT.

1. *Warranty. Execution sale.* If a slave is sold at an execution sale, and bid off by a party, and immediately after the property is struck off, and before the slave is delivered, by agreement with another competing bidder, the latter is substituted as the purchaser, and the bill of sale made to him, the *substitute* takes his place, not as a purchaser from him, but as the successful bidder at the sale, and takes upon himself all the risks which devolve upon purchasers at execution sales. There is no warranty by the first purchaser, either express or implied. The maxim, *caveat emptor*, applies. *Whitson v. Fowlkes*, 538.

2. *Consideration.* If the person thus substituted as the purchaser, in place of the party to whom the slave is struck off, is sued; and upon application to him, the latter agrees to pay a part of the expenses of said suit, such promise is without consideration, and void. *Ibid.*

See BANKS. CHANCERY JURISDICTION. LEASE, MARRIAGE CONTRACT. PRACTICE AND PLEADING. SALE OF REAL ESTATE. WARRANTY.

CONVERSION.

1. *Waiver.* The question, whether or not a conversion of property is waived, is a question of intention. It is a mixed question of law and fact, to be submitted to the jury under proper instructions from the Court. It must, in all cases, appear that the party had full knowledge of his rights, in respect to the matter of which the waiver is predicated, for if ignorant thereof, of course no intention to waive anything can be implied. *Traynor v. Johnson*, 51.

2. *Same. Case in judgment.* The plaintiff hired her slave to the defendant, by express contract, to be employed in a particular service.

The defendant sub-hired the slave to be employed in a totally different service, and pending said latter service, the slave was taken violently ill; and, at the suggestion of the physician, he was taken to the house of plaintiff to be nursed, where he died. It is held, that the mere fact of the plaintiff's receiving the slave, under the circumstances, was not of itself, a waiver of the conversion; but it depended upon the motive with which it was done, which was matter to be considered, by the jury. *Ibid.*

See SLAVES.

CORPORATION.

Bank of East Tennessee. Personal liability of directors. Act of 1843, ch. —, § 12. By the 12th section of the charter of the Bank of East Tennessee, the directors of that institution, who may sanction certain violations of the charter specified therein, may be held liable in their individual property, for any loss or damage thereby, to the creditors of the bank; and it is held, that before such liability can be enforced, it must be established by some judicial proceeding set on foot for that purpose, that said charter has been violated; though it is not essential that a forfeiture of the charter be declared; and it must be shown also, that the effects of the corporation have been exhausted. *Johnson v. Churchwell*, 146.

See CHANCERY JURISDICTION. CONSTITUTIONAL LAW. PRACTICE AND PLEADING.

COVENANT.

1. *Consideration. Bond given to indemnify endorser.* An accommodation endorser proposed to confess a judgment, at the appearance term, for the purpose of taking a judgment, by motion, against his principal, who was then solvent. He declined doing so, upon the execution of a bond to indemnify him, as such endorser, in the event he was forced to pay any thing in consequence of said suit. It is held, that this was a sufficient consideration to sustain said bond, and the endorser could sue thereon, if forced to pay any part of the debt in suit. *Oliver & Gilliam v. Markes*, 536.

2. *Need not exhaust his remedy against others.* The parties are bound by the conditions of the bond. And if there is no stipulation that the obligee in the bond is to exhaust his remedies against his principal, or a prior endorser, he is not bound to do so. It is sufficient to maintain the action, that the principal has no property out of which the debt can be made, and that the obligee has been compelled to pay the same. *Ibid.*

See SALE OF REAL ESTATE.

CREDITOR AND DEBTOR.

See FRAUDULENT CONVEYANCES.

CRIMINAL LAW.

1. *Peace warrant. Husband and wife.* A husband may demand sureties of the peace, in behalf of his wife, against any one from whom danger to her life or person may be justly apprehended, and may take the oath required for such purpose. *State v. Tooley*, 9.
2. *Same. Same. Parent and child. Guardian and ward. Master and slave.* The individual occupying the relation of protector for those under disability, can lawfully demand sureties of the peace for such persons under disability, and make the necessary oath for that purpose; as the husband for the wife, the parent or guardian for infants of tender years or persons *non compos mentis*, the master for the slave, and in all other cases where the individual, whose life or person is in danger, is disqualified by law from taking the oath necessary to obtain the warrant, or from being prosecutor in the case. *Ibid.*
3. *Same. Feme covert.* If sureties of the peace be demanded against a *feme covert*, she must find security by her friends. She cannot be bound herself, because incapable of binding herself by recognizance; and the same rule applies to infants. *Ibid.*
4. *Continuance. Act of 1827, ch. 80, § 2.* The act of 1827, ch. 80, authorizing a continuance at the first term upon the affidavit of the prisoner, that he cannot go safely to trial on account of popular prejudice against him, should receive a liberal exposition in favor of human life. Thus, a prisoner indicted for a capital felony was not arraigned at the term at which the indictment was found, for the want of time; and at the succeeding term, upon his arraignment, he asked a continuance under the provisions of the act of 1827, ch. 80, § 2, which was refused him. This is held to be error. The "first term" in the sense of the statute, means the term at which the prisoner is arraigned for trial; and it is then that such an affidavit of itself, entitles him to a continuance. *John (a slave) v. The State*, 49.
5. *Indictment.* The objection that two counts of the indictment, the one charging a larceny of the goods and the other a receiving of the goods knowing them to have been stolen, are repugnant, comes too late after verdict. *Janeway v. The State*, 180.
6. *Forgery. Indictment.* An indictment for forgery must set forth with literal precision the instrument alleged to be forged, if in existence and within the control of the prosecutor, and if not in existence, or not within the control of the prosecutor, the excuse for the omission to set it forth must be stated according to the facts. *Croxdale v. The State*, 139.
7. *Same. Same.* An indictment for the fraudulent passing of a forged paper must use the descriptive words used in the statute, or words exactly equivalent. *Ibid.*

8. *Act of 1833, ch. 10. Running horse races along a public road.* To constitute the offence of running a horse race along a public road, under the act of 1833, ch. 10, it is not necessary that there should be a bet or wager upon the result of such race. *Goldsmith v. The State*, 154.
9. *Same. Same. Indictment. Variance.* An indictment charging the offence of running a horse race in and along a public road, is maintained by proof that mules were used in the same, and not horses. *Ibid.*
10. *Principal and Agent. Noxious food.* A person engaged in the business of furnishing provisions for market, is bound to use ordinary prudence and care to avoid the sale of noxious and unsound food. If his agent sell noxious provisions, the condition of which he or his agent might, by due care, have ascertained, he will be criminally liable. *Hunter v. The State*, 160.
11. *Plea of former conviction. Replication.* The plea of a former conviction before a justice under the small offence law, to an indictment for a misdemeanor is good, without the averment that the trial and conviction before the justice were not fraudulent and intended to shelter the defendant from the punishment due his offence. If the State intends to rely upon any such thing to avoid the force of the plea, it must be put in issue by replication. *State v. Clenny*, 270.
12. *Indictment. Finding of the grand jury.* The grand jury cannot find a part of the same charge to be true and another part false, but must either maintain or reject the whole. Therefore, on an indictment for murder they cannot find a true bill for manslaughter. *State v. Cowan*, 280.
13. *Same. Same. When different counts.* This rule does not extend to an indictment joining different counts, as each count is regarded as containing a distinct charge. *Ibid.*
14. *Same. Same. Grand jury under the control of the Court.* The grand jury are under the control of the Court. It is the province and duty of the Court to see that the finding is proper in point of law, and if not, the Court may recommit an improper or imperfect finding, and may, if necessary, exercise the power of compelling a proper discharge of duty on the part of the grand jury. *Ibid.*
15. *Duty of the grand jury.* The grand jury may safely, as a general rule, act upon the presumption that the law officer of the government has investigated the facts, and described the offence properly in the indictment; and their duty is, simply, to inquire whether or not a *prima facie* case is made out, as charged in the indictment. *Ibid.*

16. *Pleading. Plea in abatement not favored.* A plea in abatement is not favored, and must be taken with great strictness. *Lewis v. The State*, 329.
17. *Same. Form of plea in abatement.* A plea in *abatement* to a presentment, should commence by praying judgment of the presentment, and conclude with a like prayer. and that said presentment be quashed. If it begin and conclude like a plea in *bar*, it is bad as a plea in *abatement*. *Ibid.*
18. *Same. Replication.* To a plea in abatement setting forth that the defendant was indicted by the wrong name, a replication, alleging that the defendant is called and known by the name mentioned in the presentment, is good. *Ibid.*
19. *Same. Demurrer reaches the first defect.* A demurrer reaches the first defect in pleading. *Ibid.*
20. *Same. Respondeat ouster. Final judgment.* Upon sustaining a demurrer to a plea in abatement, the proper judgment is, that the defendant plead over; but if he refuse to do so, the Court may render final judgment against him. *Ibid.*
21. *Same. Replication and issue filed in brief.* If the defendant plead in abatement, and the State replies, the words "*Replication and issue*," in brief, found in the record in the absence of evidence that they were intended as an issue upon the *State's replication*, will be treated as a nullity. *Ibid.*
22. *An infant may be prosecutor.* Act of 1801, ch. 30. Code, § 5097. By the act of 1801, ch. 30, no indictment can be presented to the grand jury without a prosecutor. By section 5097 of the Code, various exceptions are made to this requirement. But in all cases not falling within one of the exceptions made, a prosecutor is still required. An infant is not prohibited by statute, nor by public policy, from becoming prosecutor, and may, therefore, be endorsed as such. *State v. Dillon*, 389.
23. *Recognizance. Judgment when joint.* The judgment upon a recognizance for the appearance of a party charged with a crime, must pursue the terms of the defendant's undertaking. If, therefore, the recognizance entered into by the defendant and his securities, is joint and several, the State is entitled to but one judgment for the penalty thereof. It is error to render separate judgments against the defendant and each one of his bail. *Scott v. The State*, 433.]
24. *Pleading. Demurrer.* If several judgments are rendered upon a recognizance, when there should be but one, and separate writs of *scire facias* are issued on said judgments, the question as to the power of the Court to render more than one judgment for the penalty, may be raised by demurrer. *Ibid.*

25. *Question Reserved.* The record does not raise the questions, whether a satisfaction of one of the judgments would preclude the State from enforcing satisfaction of any of the others; and whether the right of contribution between the bail exists, in case one should be subjected to satisfaction of the entire penalty, or a greater amount than his equal portion, and they are left undecided. *Ibid.*

26. *Larceny Variance between the indictment and proof.* In an indictment for larceny, whenever a person has a special property in a thing, or holds it in trust for another, the property may be laid in either. Thus, if a constable has collected money for another, and it is stolen from him, it may be laid as the property of the constable or the owner. If the money, at the time stolen, was in the possession of the wife, her possession would be that of her husband. *Hill v. The State*, 454.

See WITNESS.

CROSS-ACTION.

See CONSIDERATION.

CUSTOM.

See BANKS.

DAMAGES.

In trover and case. In *trover* the rule of damages is arbitrary; the measure, in general, is the value of the property tortiously converted. But in *case*, which is an action founded on the plaintiff's title in justice and equity to receive a compensation in damages, they are to be estimated by the jury in view of all the circumstances of the particular case; and, under the general issue, the defendant may give in evidence any facts or circumstances which in equity are sufficient to bar the plaintiff's claim. *Jones v. Allen*, 626.

See MARRIAGE CONTRACT. NEW TRIAL. SLAVES. WRIT OF INQUIRY.

DEOREE.

See CHANCERY PRACTICE.

DEED.

Delivery of. As to whether there has been a delivery of a deed, is a question for the jury, open to parol evidence, and may be inferred from circumstances. The execution of a deed, and procuring it to be registered, is not conclusive evidence of delivery; but it is *prima*

facie evidence of the fact, and is sufficient to throw the *onus* upon the bargainor of proving that he did not intend it as a final delivery; but it was his purpose still to hold it in his power, and not then to take effect. *Thompson v. Jones*, 574.

See CHANCERY. EVIDENCE. ESTOPPEL. GIFT. HUSBAND AND WIFE.

DEED OF TRUST.

See ATTACHMENT. FRAUDULENT CONVEYANCES.]

DELIVERY.

See DEED.

DEMURRER.

See CHANCERY PLEADING. CRIMINAL LAW. PRACTICE AND PLEADING.

DEPOSITIONS.

1. *Justice's certificate.* Act of 1801, ch. 5, § 32. The act of 1801, ch. 5, § 32, applies exclusively to depositions taken in equity causes, and not to depositions taken in cases pending in Courts of Law. There is no law or rule of Court in force, requiring the justice taking depositions at law, to certify that he is not interested in the event of the suit, nor of counsel or attorney for either party. *Looper v. Bell*, 878.
2. *Same. Read without exception.* If a deposition is read in the Court below without exception, or if excepted to, and the exceptions not acted on, or if the deposition of the excluded witness is retaken and read without exception, substantially proving the facts stated in the first deposition, no error exists for which a new trial will be granted. *Ibid.*
3. *Leading questions.* If leading questions are put, and answers permitted by the Court to go to the jury, it would be difficult to assign it, in the Supreme Court, as error. But, upon the hypothesis that it can be done, the party excepting for this cause, must specifically point out and make his objection to the illegal matter. He cannot put the Court in error by a general exception. *Ibid.*

DESCENT AND DISTRIBUTION.

Father next of kin to child dying intestate, without issue. The father is the next of kin to a child dying *intestate*, without wife or issue surviving, and succeeds to his personal estate. *Gardenhire v. Hinds*, 402.

See PARTNERSHIP.

DISCONTINUANCE.

See ACTION. PRACTICE AND PLEADING.

DISCOVERY.

SEE CHANCERY.

DISCRETION OF COURT.

See CONTINUANCE. PRACTICE AND PLEADING.

DOWER.

1. *Widow not dowerable of lands held in remainder.* Act of 1784, ch. 22, § 8. At the common law, an indispensable element in the claim to dower, is the *seizin* of the husband during the coverture. An actual *seizin* is not necessary. A *seizin* in law is sufficient. But the freehold and inheritance must be consolidated, and be in the husband *simul et semel* during the marriage, to render the wife dowerable. The husband is not thus seized of a remainder interest in land, during the continuance of the life estate, and if he die before the termination of such estate, his widow is not entitled to dower in said lands, upon the death of the tenant for life. This rule of the common law is not changed by the act of 1784, ch. 22, § 8. *Apple and Wife v. Apple*, 348.
2. *In slaves. Law of Kentucky.* By the law of Kentucky, slaves are placed, as to the widow's dower, upon the same footing as realty; and she is entitled to one-third of the slaves during her life, with remainder to the heirs at law of the deceased husband. *Gassaway v. Hopkins*, 583.
3. *Same. Same. Forfeiture of, by removal.* If the second husband of a widow endowed of slaves belonging to the estate of her previous husband, remove the slaves beyond the limits of Kentucky, he forfeits his right to them; and the remainderman may possess and enjoy all the estate which such husband holdeth in right of his wife's dower, for and during the life of said husband. This forfeiture does not accrue upon a *sale* by the husband in the State, nor upon the removal of the slaves, by the purchaser, from the State. *Ibid.*

See SLAVES.

EJECTMENT.

Venue. Act of 1848, ch. 178. The action of ejectment is in its nature local, and must be instituted in the county where the land lies. If commenced in the wrong county, the defendant may take advantage of it on the trial. The act of 1848, ch. 178, only applies to cases

where the land *in dispute* is situated in two or more counties. If the land sued for is altogether in one county, the suit must be brought in that county, although the grant covering it may embrace lands in another county. *Draper v. Kirkland*, 260.

EMANCIPATION.

See SLAVES.

ESTOPPEL.

1. *Admissions and declarations as to land boundaries.* Admissions which have been acted upon by others are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced. Thus, in ejectment, where it appeared that many years before the suit the defendant had admitted a certain line to be the true boundary between him and the plaintiff, and the plaintiff and those under whom he claimed had accordingly so held and claimed ever since, the defendant is held to be estopped from a denial of such boundary. *Spears v. Walker*, 166.
2. *Acceptance of the provisions of a deed.* A party is estopped from ever denying his liability upon a note, after the execution of a deed of trust to secure said note, and the acceptance of its provisions. Thus, if the name of a person is forged to a note, and the maker of the note execute a deed of trust to secure the payment of the same, and in a controversy as to the validity of said deed, such person file an answer insisting that the deed was *bona fide* executed, and claiming the indemnity given thereby, he is ever after estopped from denying his liability upon the note and could not rely upon the plea of *non est factum*. *Pitts v. Gilliam*, 549.

See ATTACHMENT. STAY.

EVICTIION.

See SALE OF REAL ESTATE.

EVIDENCE.

1. *In description of land in a deed.* Of mistake in recital of number of grant. Where there is a mistake in the recital of the number of a grant in a deed, and the land is otherwise sufficiently identified and described, such mistake is immaterial. *Fancher v. DeMontegre*, 40.
2. *Book debt law.* Act of 1756, c.8. —. An account for goods, wares, and merchandise, delivered to be sold on commission, cannot be proven by the plaintiff's own oath under the book debt law. *French and Van Epps v. Brandon and Keinbrusch*, 47.

8. *Plat annexed. Marked boundary will control.* A plat annexed to a partition, or grant, is competent evidence to be looked to in ascertaining the true boundary of the land set apart; but the party is entitled to the lands actually appropriated, and if the land has been actually surveyed, and the lines marked different from the plat, the marked boundary will control. *Mayse v. Lafferty*, 60.
4. *Witness.* Where a witness does not recollect having said that which is imputed to him, it is competent to prove that he did say so, provided it be relevant to the matter in issue. *Janeway v. The State* 180.
5. *Acts and declarations of the assignor.* The acts and declarations of the assignor of a note, anterior to the filing of the bill, are competent evidence in a contest between an attaching creditor and the assignee. *Sugg v. Powell*, 221.
6. *Statements of the slave.* Statements made by a slave to the attending physician, while investigating the character and symptoms of his disease, are admissible as evidence. *Looper v. Bell*, 378
7. *Parol declarations not admissible.* When a person has executed an instrument of writing, in the absence of fraud, mistake, or unfairness, parol evidence is not admissible to change his liability created by the written instrument. It must be taken to contain conclusive evidence of the final and deliberate intention and agreement of the parties. *Kearley v. Duncan*, 397.
8. *Chancery practice. Exceptions to evidence and exhibits.* Objections made to the reading of evidence and exhibits in the Court below must be clear and specific, that the opposite party may have the opportunity of curing the defect, if it be one, and not be taken by surprise when that opportunity can no longer be had. *Ingram v. Smith*, 411.
9. *Same. Same. Case in judgment.* The bill of exceptions shows that the copy of the will was objected to on the trial "because not authenticated according to law," and "because the said paper had not been filed in Court according to law." The precise character of the objections is not stated, but in argument it was urged that the certificate of the clerk is insufficient for want of a seal, and the exhibit was filed during the term at which the cause was tried, and without the one day's notice required by the 19th rule of Chancery Practice. Held, that the objections are not sufficiently specific—that it does not appear that either of them were made, or could have been made in the Court below, and they cannot avail the party in this Court. *Ibid.*
10. *Same. Admissions in the answer.* If an exhibit is objected to as evidence, and the objection erroneously overruled in the Court below, yet if the material part of said exhibit is copied into the answer, and admitted to be true, the objection cannot avail the party, as he is bound by his answer. *Ibid.*

11. *Witness. Competency. Release.* The husband and wife who have conveyed slaves are incompetent witnesses in a contest between the purchasers from them, or their assignees and remaindermen, unless a release is given them. Such release, to be effectual, must be executed by all the parties in interest, or by all who may have a claim upon them upon their covenants. A release by a portion of the parties will not render them competent. *Ibid.*
12. *Husband and wife. Competency of the wife after a divorce.* The wife is an incompetent witness to testify, in a suit to which the husband is a party, touching any matter that transpired during the existence of the marriage union, although she is divorced from him at the time she is called as a witness. *Kimbrough v. Mitchell*, 589.
13. *Declarations of the vendor.* The right of a party to property *bona fide* purchased by him, cannot be prejudiced by statements made by the vendor, not in his presence, as to the transaction, but if the sale and purchase be unlawful and colorable, to hinder and delay the creditors of the vendor, the declarations of both are evidence against each of them. *Neal v. Peden*, 546.
14. *Statements of the vendor while in possession. Res gestæ.* If a party make an absolute sale, and retain possession of the property inconsistently with the terms of the sale, his declarations in reference to the ownership, or contract, or terms upon which he holds possession of the property, are admissible as part of the *res gestæ*. *Ibid.*

See CHANCERY. CHANCERY PRACTICE. FRAUDULENT CONVEYANCES. NEW TRIAL. PRINCIPAL AND AGENT. PRACTICE AND PLEADING. STAT. SLAVES. WRIT OF INQUIRY. WILL. WARRANTY.

EXCEPTIONS.

See EVIDENCE.

EXECUTION.

1. *Practice. Sheriff. Remedy when there is doubt as to the proper disposition of money raised on several executions.* If the sheriff has raised money, under several executions issued from the same Court, and is at a loss how to distribute it, the Court will, in a summary way, upon the facts stated in the return, advise how it should be distributed. It has the power over its suitors, and will so appropriate the money as to bind them, and protect the sheriff. *Wiley v. Bridgman*, 68.
2. *Return of.* An officer is bound to return an execution within the time prescribed by law, unless authorized by the plaintiff to hold it up. Simply authorizing or directing a postponement of the sale of property levied on, is not sufficient to excuse a return of the execution. *Koger v. Donnell*, 377.

See CHANCERY JURISDICTION.

EXECUTION SALE.

See **CONTRACT.**

FAMILY COMPROMISES.

Family compromises, fairly and reasonably made, to save the peace of a family, and prevent family disputes, will be sustained by a Court of equity. And if, upon a doubtful question of construction of a will, and uncertainty as to the rights of the children, the father, children, and neighbors selected to settle their rights, join in consultation, and deliberately agree upon terms of compromise and settlement, which are reduced to writing and signed, there being no unfair advantage taken, or imposition practiced, a Court of Equity will not interpose and set the same aside at the instance of a party who may have acted under a mistake as to his legal rights, and surrendered a legal advantage. *Owen and Wife v. Hancock*, 568.

FEME COVERT.

See **CRIMINAL LAW.**

FENCES.

See **PRACTICE AND PLEADING.**

FERRY AND FERRYMAN.

Liability of ferryman. Common Carrier. A ferryman is liable as a common carrier. The keeper of a public ferry is bound to have a boat, safe and sufficient, for all the purposes incident to his employment. He is likewise bound, at all times, to have a skilful ferryman, and a sufficient force to manage the boat; and to take proper care of persons, and all kind of property received for transportation. And for all loss or injury occasioned by neglect of these duties and precautions, he is liable. *Saunders v. Young and McFerrin*, 219.

FORCIBLE ENTRY AND DETAINER.

What necessary to authorize the action. In order to maintain the action of forcible entry and detainer, it is not necessary that actual force should be shown. The law implies force in every unauthorized entry upon the premises of which another is in the peaceable possession, and in every unauthorized obstruction of such possession. Thus, the action may be maintained where it appeared that the plaintiff was in the peaceable possession of the premises and had erected an enclosure thereon, and the defendant, against the will, and in spite of the remonstrances of the plaintiff, came upon the premises and erected an enclosure around that of the plaintiff, although he did not remove any part of the plaintiff's enclosure, or otherwise disturb the same. *Gass v. Newman*, 186.

FORFEITURE.

See SLAVES. WITNESS.

FORGERY.

See CRIMINAL LAW.

FRAUDS, STATUTE OF.

Statute of. Division of lands belonging to partners. If lands belong to parties as a firm, and are described in the deeds for them, nothing more is required, in a division between the partners, than to designate the tracts assigned to each by such terms as will be understood, or the general appellations by which the different tracts of land are known. Such an agreement is not within the principle requiring the particulars of the contract to be set forth in writing. *Farris v. Caperton*, 60f.

FRAUD.

See CHANCERY. CONSIDERATION. REDEMPTION. SLAVES. SALE OF REAL ESTATE.

FRAUDULENT CONVEYANCES.

1. *Deed of trust. Creditor and debtor.* A deed of trust, for the benefit of creditors conveying property, not sufficient to satisfy the debts, and which stipulates that the fund arising from the sale of the property conveyed is to be divided *pro rata* among the creditors; that all the creditors receiving such *pro rata* shall take it in absolute acquittance of their entire debts, or otherwise receive nothing; and that, in the event any portion of the creditors should not acquiesce in the terms of the conveyance, those who should so acquiesce should have their debts paid in full, and the balance, if any, should be paid to the bargainor, is absolutely void upon its face, and of no effect. *Wilde v. Rawlings*, 84.
2. *Debtor and creditor.* The mere fact that a credit of one, two and three years is given upon a sale of land by one indebted, will not of itself render such sale fraudulent in law. *McCasland v. Carson*, 117.
3. *Voluntary to child or other person.* A voluntary conveyance to a child or relative, or even to a stranger, is good, if it be not, at the time, prejudicial to the rights of any other person, or in execution of any meditated scheme of future fraud or injury to other persons. Although the party may not have been indebted at the time of making the voluntary gift or conveyance, still, if it was made with any design of fraud or collusion, or injury to other persons in future, it will be void. *Nicholas v. Ward*, 323.
4. *Existing and subsequent creditors.* If the conveyance is made with the intention to defraud existing creditors, it will, in general, be held void as to subsequent creditors. But if there be no existing creditors and if the conveyance is made *bona fide*, and under circumstances which repel any presumption of fraud, subsequent creditors cannot impeach it although it is voluntary. *Ibid*.

5. *Same. Evidence.* A voluntary conveyance or settlement will be presumed fraudulent as against existing creditors. But, as to subsequent creditors, there is no such presumption, and fraud in fact must be established. *Ibid.*
6. *Judgment not necessary before filing a bill.* Act of 1852, ch. 365, § 10. By the act of 1852, ch. 365, § 10, a creditor, whether he has a judgment or not, may file a bill to set aside a fraudulent conveyance, and have satisfaction of his debt out of the property conveyed. *Fay v. Jones*, 442.
7. *Husband and wife. Husband may be the agent of the wife.* It is competent for the husband, as the agent of his wife, to invest her money in the purchase of a tract of land. If the land is in fact purchased for the wife, and paid for with her money, in pursuance of an agreement between the husband and wife, founded upon a sufficient consideration, the transaction is not fraudulent as against the husband's creditors. *Ready v. Bragg*, 511.
8. *Usury.* At the date of the execution of the deed of trust attacked, the Bank of Nashville had a judgment against Smith, Doak, Cummings, and Blakemore, for \$13,000. Blakemore and Cummings were endorsers, and had filed a bill to be relieved from liability, on grounds assumed by them. The bank had also filed a bill against Hays, on account of his transactions with Smith in relation to his land, in which it was claimed that he was liable for about \$8,000. Smith and Doak were insolvent, but Cummings and Smith were good. In this state of things, Hays, then having a large property, though much involved, entered into an agreement with the bank, and with Cummings, Blakemore, and Cooper, that if the bank would loan him \$15,000 on long time, and the other parties \$6,250, he would assume the debt of \$13,000, and secure the whole by a deed of trust upon his land and slaves. This agreement was executed. It is held, that the contract was not *usurious* as to the \$13,000, nor was the conveyance fraudulent and void as to the creditors of Hays. *Roane v. Bank of Nashville*, 526.
9. *Excess of property. Extension of time.* If judgments are hanging over the maker of a deed of trust, and the debts secured are for a large amount, it is not improper to make the security ample. Nor will the fact that a larger amount of property than is necessary to pay the secured debts, is included in the conveyance, render it void. Neither will the extension of the time of payment to five years make it fraudulent as to creditors. *Ibid.*
10. *What meant by the words hinder and delay creditors.* The words "hinder and delay" are to be taken in their legal or technical, and not in their literal sense. The statute refers only to an improper or illegal hindrance and delay; not to such as is reasonable and fair in the exercise of the well established right to prefer creditors. Hence,

a conveyance made to prevent creditors from sacrificing the property of the debtor by a sale, or to prevent a race of diligence among his creditors for his property, by appropriating it to preferred creditors, is not within the statute and is valid. *Hefner v. Metcalf*, 547.

See MORTGAGE.

GIFT.

1. *Inter vivos*. Choses in action and money are the subject of a valid donation *inter vivos*. An endorsement, or mere delivery accompanied by words of donation, will be sufficient to pass the title, and vest in the donee a property in them. *Donnell v. Donnell*, 267.
2. *Construction*. The *habendum* of the deed is: "To have and to hold the said five negroes and their increase to the said George A. Lucas and Peter W. Lucas, and the heirs of her" (the donor's) "body, if any there be; to the sole use of the said George A. Lucas and Peter W. Lucas, and the heirs of her body, if any there be, after the said Sally E. Lucas' death. By this deed the donor reserved the possession and services of the slaves during her own life, vesting in the donees a present title to them, but postponing their right to the beneficial use and possession of said slaves, until her death. *Woodson v. Smith*, 276.

GRAND JURY.

See CRIMINAL LAW.

GRANT.

See EVIDENCE. SCHOOL LANDS.

GUARDIAN AND WARD.

1. *Verbal lease of infant's land*. *Trespass quare clausum fregit*. Act of 1762, ch. 5, § 13. A defendant, in an action of trespass *quare clausum fregit*, for injuries to the land of an infant, cannot defend himself on the ground that he was in possession of the land under a verbal lease from the guardian. A lease of an infant's lands, by the guardian, must be in writing, or it is a nullity. The provisions of the act of 1762, ch. 5, § 13, upon this subject, are imperative upon the guardian. *Sawyers v. Zachery*, 21.
2. *Investing ward's money in land*. *Chancery jurisdiction*. The Chancery Court has exercised the jurisdiction of changing the nature of the personal estate of infants in cases where it was made to appear that it would be for their manifest benefit, but if the infant lives he may take it as real estate without prejudice to his right over it during infancy as personal property. *Singleton v. Love*, 357.

3. *Same. Same.* The Court has also supported a conversion by the guardian out of Court, in investing the ward's money in land, where the circumstances were such that the Court itself would have directed a like investment. But the ward, when he arrives at full age, has his election to take the land, or the money thus invested, with interest. And if he dies during minority, his proper representative will have the right to treat the real estate purchased with the infant's money as personalty, and distributable as such. *Ibid.*
4. *Same. Election of the ward or representative.* Neither the ward nor the representative can elect to ratify the transaction in part and repudiate it in part. If an election is made to take the money invested, with interest, the party making the election will be required to relinquish all interest in the land purchased by the guardian. *Ibid.*
5. *Same. Same. Case in judgment.* The guardian, at the request of the ward, then nineteen years old, sold a small piece of land, and invested the proceeds and other moneys of the ward in the purchase of other lands. The ward married, and died without issue, before attaining her majority. The sale and investment were for the manifest advantage of the ward. Her and her husband expressed themselves well pleased with the transaction. After the death of the ward, her husband administered on her estate, and sued the guardian for the personalty due. He sought to ratify the acts of the guardian in part, and to repudiate them in part. It is held, that he was *estopped* from disaffirming the acts of the guardian—that it was an entire transaction, and the husband is bound by his approval, in part, of the acts of the guardian, and cannot recover the money invested. *Ibid.*

See CRIMINAL LAW. TRUST AND TRUSTEE.

EIRER.

See SLAVES.

HORSE RACING.

See CRIMINAL LAW.

HUSBAND AND WIFE.

1. *When a conveyance is a fraud upon the marital rights.* Whether a conveyance is a fraud, or not, upon the marital rights depends on the circumstances of each case, the conveyance of an unmarried woman, although made immediately before marriage, being *prima facie* good. In this case the husband, previous to the marriage, represented himself to be a man of wealth, when in fact he was insolvent. He was apprised of the conveyance shortly after the marriage, and took no

steps to have it set aside. He set up no claim to the negroes, but recognized the right of his wife under the conveyance. Held, that the conveyance was not a fraud upon the marital rights of the husband, and is valid. *Saunders v. Harris*, 185.

2. *Marital rights of the husband.* So soon as the wife acquires title to personal property, being in possession, the marital right of the husband attaches, and the title passes to him by operation of law, and he cannot divest himself of his right to property thus cast upon him by law, by declaring that it belongs to his wife. The property belongs to him, and upon his death, goes to his legal representatives for the payment of his debts. *Wade v. Cantrell and Tubb*, 346.
3. *Marital rights of the husband. Deed of settlement and will. Construction.* Property was conveyed to the trustee in trust, that he should "hold the above described negro girls, slaves, as aforesaid, and the increase of the said girls, to the sole and separate use and benefit of the said Margaret Hinds, and her heirs forever, to enjoy the possession and profits of the above named girls and their increase, to her and their own, and sole and separate use and benefit forever. Property was also devised to said trustee, for the benefit of the daughter, that "she and her heirs are to be permitted to use and enjoy the rents, profits, and emoluments of the said land, and the profits and increase of the last aforesaid negroes, forever." It is held, that by the true construction of both the deed and will, the marital rights of the husband are excluded altogether in favor of the "heirs," that is, the blood relations and next of kin. *Gardenhire v. Hinds*, 402.
4. *Marriage settlement. Gifts inter vivos. Construction.* Where, by a marriage contract, in which the property of the wife was settled upon her with a provision, that, in the event she bore children, she should have no power of disposition; but if she bore no children, her power of disposition should be as that of a *feme sole* over her own property; but which declared her power of disposition to be by will, or in the event of her dying without a will, that the property should "descend to the person or persons that she may have, in her lifetime, said it should go to, and vest in as valid a manner as if she had made her will;" it is held that her power of disposition is only testamentary in its character, and that a deed of gift, *in presenti*, by which the wife conveyed the property to another, was unauthorized by the contract, and therefore void. *Hoyle v. Smith*, 90.

See CHANCERY PRACTICE. CRIMINAL LAW. EVIDENCE. FRAUDULENT CONVEYANCES. IMPROVEMENTS. SLAVES. TRUST AND TRUSTEE.

IGNORANCE OF LAW.

See CHANCERY.

IMPROVEMENTS.

Made upon the wife's real estate. If the husband voluntarily and without consideration, makes improvements upon the wife's real estate, they cannot be reached by his creditors for the payment of their debts. *Wilkinson v. Wilkinson*, 306.

See LEASE.

INDICTMENT.

See CRIMINAL LAW.

INTEREST.

See CERTIORARI AND SUPERSEDEAS. SLAVES.

INFANCY.

See CRIMINAL LAW. PRACTICE AND PLEADING. STATUTE OF LIMITATIONS. SALE OF REAL ESTATE.

INSOLVENT ESTATES.

See STATUTE OF LIMITATIONS.

JUDGMENT.

Cannot be set aside as to one and stand against others. A judgment can not be divided. If it is correct against one party, but erroneous as to others, it cannot be affirmed as to him, and set aside as to the others. There must be a general reversal. *Draper v. McLellan*, 262.

See CERTIORARI AND SUPERSEDEAS. CHANCERY JURISDICTION. COVENANT. CRIMINAL LAW. FRAUDULENT CONVEYANCES. PROCESS. PRACTICE AND PLEADING. SUMMARY PROCEEDINGS.

JUDICIAL KNOWLEDGE.

Registers. The Courts of this State will judicially know the registers of the several counties of this State. *Fancher v. DeMontegre*, 40.

JURISDICTION.

Appeal. Certiorari. If a justice of the peace exceeds his jurisdiction, by rendering a judgment against an endorser for more than fifty dollars, the latter must avail himself of it by an appeal; or, if ignorant of the judgment, by bringing the cause up to the next term of the Circuit Court for a new trial, by a petition for writs of *certiorari* and *supersedeas*. It cannot be reached by a *certiorari* to quash the judgment and execution. *Mason v. Westmoreland*, 556.

See JUSTICE OF THE PEACE. REPLEVIN.

JURY.

See NEW TRIAL.

JUSTICES OF THE PEACE.

Jurisdiction. Endorsee against endorser. A justice of the peace has no jurisdiction to render judgment in favor of the endorsee against the endorser of a promissory note, for a greater sum than fifty dollars, unless demand and notice are expressly waived in the endorsement. *Mason v. Westmoreland*, 555.

See REPLEVIN. STAY.

KENTUCKY, LAW OF.

See DOWER. STATUTE OF LIMITATIONS.

LANDLORD AND TENANT.

Landlord's lien. Act of 1825, ch. 81. Act of 1856, ch. 77. The lien of the landlord upon the crop raised on the premises, to secure the payment of the debt for rent, given by the act of 1825, ch. 81, is *superior* to the claim of the debtor under the laws of the State exempting certain property from execution. The act of 1856, ch. 77, is general in its terms, and does not repeal or modify the act of 1825, ch. 81, or in any way impair the lien given by that act. *Hill v. George*, 394.

LARCENY.

See CRIMINAL LAW.

LEASE.

1. *Tenants in Common. Contract.* A contract made by one tenant in common, without the concurrence of his co-tenants, for a lease of the lands jointly owned by them, is not binding upon such co-tenants.
2. *Improvements.* A party put in possession of lands under a void lease, cannot recover for improvements made thereon, unless they enhance the value of the land. *Vaughan v. Cravens*, 108.

See GUARDIAN AND WARD. SCHOOL LANDS.

LEVY.

See ATTACHMENT. PRINCIPAL AND AGENT.

LEX LOCI.

See CHANCERY.

LIEN.

See LANDLORD AND TENANT.

LIFE ESTATE.

1. *Remainder. Rights of tenant for life and remainderman.* If a fund be given to a person for life, with remainder over to another, the tenant for life has the right to use and employ said fund in any way he chooses, if he does not endanger its safety. *Vaden v. Vaden*, 444.
2. *Same. Same.* If the tenant for life vest the fund in the purchase of slaves or other property, the title vests absolutely in him. The remainderman has no right to, or interest in the property, except so far as it may be held, upon a bill for that purpose, as a security for the fund. *Ibid.*
3. *Same. Same. Illustration of the principle.* A fund was bequeathed to A. for life, with remainder to B. A purchased a negro girl with a portion of the fund thus bequeathed. A. afterwards intermarried with D. Upon the death of D., his administrator claimed the negro and increase as the property of the estate. The remainderman claimed the right to elect whether he would take the slave or the fund. It is held, that the title to the slave vested absolutely in A., and, upon her marriage with D., the title passed to him by operation of law, and upon his death to his administrator; that the remainderman had no right to, or interest in the slave. All that he could demand would be the *corpus* of the fund at the death of the tenant for life. *Ibid.*

See TRUST AND TRUSTEE.

MARRIAGE CONTRACT.

1. *When void or voidable.* A promise of marriage made in consideration of *illicit intercourse* is void, and cannot be enforced. If the plaintiff is delivered of a child after the promise, not begotten by the defendant, or if the defendant supposed that the plaintiff was modest and chaste, and it turned out she was not, he would not be liable for a breach of his promise to marry her. *Goodall v. Thurman*, 209.
2. *Evidence. Seduction.* Under the general issue, in an action for a breach of a marriage contract, the plaintiff may give in evidence, in aggravation of damages, that she was seduced and got with child by the defendant. *Ibid.*
3. *Same. Damages.* In an action for a breach of promise of marriage, the damages to be recovered are in the sound discretion of the jury under the circumstances surrounding the case. They are to look to the rank and condition of the parties, the estate of the defendant, and

to all facts proven in the cause, and award damages commensurate with the injury inflicted. *Ibid.*

MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE.

MARITAL RIGHT.

See HUSBAND AND WIFE. TRUST AND TRUSTEE.

MERGER.

See WARRANTY.

MISTAKE OF FACT.

See CHANCERY.

MORTGAGE.

1. *Parol defeasance of title bond, or other executory contract.* It is well settled, that though a conveyance be absolute in its terms, it may be shown by parol proof, to be a *mortgage*. The same rule applies to a title bond, or other executory contract, and they may be shown, by parol proof, to be a *mortgage*. *Jones v. Jones*, 105.
2. *Fraudulent conveyances. Registration.* In a contest between two mortgage creditors, for priority of satisfaction out of property conveyed to both, it appeared that the instrument first "noted" by the clerk for registration but last registered, was upon its face a deed absolute, but was admitted and shown by parol to have been intended as a mortgage, and that the other was a mortgage in proper form; and it is held, that the party to the first named instrument is not deprived of the benefit of his security, merely because the instrument is in the form of a deed absolute, instead of a mortgage; but, that when a parol defeasance is shown, it only has the effect to reduce the title to that which was intended by the parties—a security for debts, instead of a sale of the property. *Ruggles v. Williams*, 141.

See REDEMPTION.

MOTION.

See ABATEMENT.

MULTIFARIOUS.

See CHANCERY PLEADING.

NEGLIGENCE.

1. *Liability for. Criterion for determining.* According to the maxim of the common law, *sic utere tuo ut alienum non laedas*, every person is responsible in law for the consequences of his own negligence, and the proper criterion for determining his liability is, whether he has been guilty of gross negligence, viewing his conduct with reference to the caution which a prudent man would, under the given circumstances, have observed. *Whirley v. Whiteman*, 610.
2. *Negligence of the party injured. Mutual negligence.* In general, if a party by his own gross negligence, brings an injury upon himself, or contributes to such injury, he cannot recover therefor. Nor, in cases of mutual negligence, where the parties are equally blameable, can there be a recovery. *Ibid.*
3. *Same. Qualification of the principle.* An important and well established qualification of this principle is, that the mere want of a *superior* degree of care or diligence, cannot be set up as a bar to the plaintiff's claim for redress, and that although the plaintiff may himself have been guilty of negligence, yet, unless he might, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence, he will be entitled to recover. He is considered the author of the injury, by whose first or more gross negligence it has been effected. *Ibid.*
4. *Further qualification of the principle.* The doctrine of negligence has been carried further in one class of cases, and to the extent, that even wilful misconduct on the part of the plaintiff, will not necessarily exclude him from the right to sue. As in cases where spring guns and dangerous instruments have been set upon one's own ground, for the protection of his property; and persons without notice, by trespassing on the grounds, have been seriously injured. *Ibid.*

NEGOTIABLE PAPER.

See ASSIGNMENT. CHANCERY.

NEW TRIAL.

1. *Judgment must be shown to be erroneous. Pleading.* A judgment of the Circuit Court will not be reversed by the Supreme Court, unless it is clearly shown to be erroneous. It is not sufficient that it may not appear to be right. It must be shown to be wrong. Substantial errors must be pointed out by the party complaining of the judgment. *Stanly v. Crippin*, 115.
2. *Same. Same. Case in judgment.* In this case there is no bill of exceptions, no declaration and plea. The parties appeared and had several continuances. A jury was duly sworn to try the issue, and, after a trial of several days, returned a verdict against the plaintiff in

- error, upon which the Court gave judgment. A motion for a new trial was made and overruled. An appeal in the nature of a writ of error was taken. Held, that since the act of 1852, the objections to the judgment must be regarded as matters of form, and not of substance, and are not sufficient to authorize a reversal. *Ibid.*
3. *Practice. Act of 1801, ch. 6, § 59.* The fact that new counts, which vary the form but do not change the cause of action, have been added to the declaration after two new trials have been granted, will not affect the operation of the act of 1801, ch. 6, § 59, which provides that not more than two new trials shall be granted to the same party in the same cause at law, or upon a trial of an issue of fact in equity. *East Tenn. & Ga. R. R. Co. v. Hackney*, 169.
 4. *Same. Same.* The exceptions to the provisions of the act of 1801, ch. 6, § 59, that not more than two new trials shall be granted the same party in the same cause at law, or upon the trial of an issue of fact in equity, are, where the new trial is granted for errors in the charge to the jury; the improper admission or rejection of evidence, or upon the ground of misconduct on the part of the jury; provided such reason be stated upon the record at the time. *Ibid.*
 5. *Excessive damages.* In trials at common law, the jury are the proper judges of damages; and where there is no certain measure of damages, the Court will not, ordinarily, disturb their verdict, unless on grounds of *prejudice, passion, or corruption* in the jury. *Goodall v. Thurman*, 209.
 6. *Relationship of a juror.* A relationship by affinity is dissolved by the death of the party, by a marriage with whom the relationship was created. Hence, a juror whose wife is dead is competent, although by his marriage he was related to one of the parties to the suit within the prohibited degree. *Ibid.*
 7. If the verdict is wholly unsupported by the evidence, a new trial will be granted. *Dickenson v. Cruise*, 258.
 8. *Practice Examination of witness after commencement of the argument.* After the evidence is closed, and two arguments made on each side, the admission of a material witness is, perhaps, an exercise of discretion scarcely to be vindicated by the most liberal practice; and if on a motion for a new trial, disclosures are made materially affecting the credibility of such witness, and the verdict is excessive, it should be set aside and a new trial granted. *Thompson v. Clendenning*, 287.
 9. *Illegal evidence admitted.* If incompetent evidence is admitted, and the opposite party proves the same fact by his witness, it being admitted, does not furnish sufficient ground for a reversal, and the granting of a new trial, since it could have done the party no harm. *Neal v. Peden*, 546.

NORTH CAROLINA.

See STATUTE OF LIMITATIONS.

NOTICE.

See ASSIGNMENT. PRINCIPAL AND AGENT.

NOXIOUS FOOD.

See CRIMINAL LAW.

OATH.

Administered with up-lifted hand. Exception must be taken at the time.

An oath administered with an up-lifted hand, is legal and binding; and if the jury selected in a cause be thus sworn, no error can be predicated of the oath. If the jury be not legally sworn, and the party or his counsel make no exception at the time, the objection can not be made available in the Supreme Court. *Looper v. Bell*, 373.

OVERSEERS.

See ROADS.

PARENT AND CHILD.

Care and custody of the child. If the child is a female, of frail and unhealthy constitution, only eight years of age, has been raised principally by the grandmother, who is eminently fit and able to raise her in a proper manner, and is willing to do so free of charge, the Court will give to the grandmother the care and custody of such child, in preference to the father, who has no wife or home, and whose means to educate her are limited. *Gardenhire v. Hinds*, 402.

See CRIMINAL LAW.

PARTNERSHIP.

1. *Liability of partners to each other for acts done for the benefit of the firm. Case in judgment.* Where three persons associated themselves together as a joint stock company to lay out and build a town, and two of them loaned a sum of money belonging to the company, in good faith for the benefit of the company, to aid in the erection of a certain manufactory, which, it was thought, would invite capital and labor to said town, and greatly promote its growth; but said manufacturing adventure proved a failure, whereby the sum of money so loaned was lost to the company, it is held that such loss was the loss of the company, and not alone of the two members thereof so making the loan. *Blair v. Johnston*, 13.

2. *As to partners right to compensation for services to firm.* A partner is not entitled to extra compensation for services rendered the firm in the absence of an express contract to that effect. And this is so as to a surviving partner also, upon whom devolves the trouble and responsibility of settling the affairs of the partnership. *Piper v. Smith*, 98.
3. *Descent and distribution. As to real estate owned by firm.* Act of 1784. ch. 22, § 6. Where real estate is held by partners for partnership purposes, it descends and vests in the heirs at law of a deceased partner, as real estate in other cases. *Ibid.*
4. *Condition precedent.* If a partnership is entered into, a failure of one of the partners to comply with the terms and conditions of the agreement will not annul the partnership, unless they are conditions precedent. *Murray v. Johnson*, 353.
5. *Inequality of partners services.* There is no principle of law that authorizes an inquiry into the inequality of the services rendered by the members of a partnership, unless there is a stipulation in their agreement to that effect. *Ibid.*

See FRAUDS. STATUTE OF.

PARTIES.

See CHANCERY PRACTICE.

PARTITION.

See SALE OF REAL ESTATE.

PAYMENT.

1. *Voluntary by an officer, of an execution in his hands.* If an officer, by his neglect, render himself liable to the plaintiff in an execution; and being so liable, without any judgment or proceeding against him to enforce his liability, he voluntarily pays to the plaintiff the full amount of said execution, without any transfer of the judgment and execution to him, it is a satisfaction of said judgment, and he cannot thereafter, take out an *alias* execution for his own benefit, and enforce its payment by the original debtor. *Lints v. Thompson*, 456.
2. *Same. Case in judgment.* An execution was placed in the hands of a constable, who neglected to make the money and return the execution in due time. Having rendered himself liable to the plaintiff, he, voluntarily, paid the judgment to him, without any judgment or proceeding against himself to enforce said liability. He returned the execution not satisfied, and procured the issuance of an *alias* execution upon the judgment for his own benefit, which was superseded on the petition of the defendant. Held, that the voluntary payment by the constable was a satisfaction and extinguishment of the judgment,

and the payment having been voluntary, the law would not imply a transfer of the judgment to the officer. That two things are necessary to create an implied transfer of a judgment to an officer paying it: First, that the liability of the officer in default shall have been fixed by the judgment of a tribunal of competent jurisdiction; and, secondly, that such judgment shall have been satisfied. *Ibid.*

See ATTACHMENT. SHERIFF.

PEACE WARRANT.

See CRIMINAL LAW.

PENNSYLVANIA, LAW OF.

See CHANCERY.

PENALTY.

See PRACTICE AND PLEADING.

PLAT.

See EVIDENCE.

PLEA.

See PRACTICE AND PLEADING.

POSSESSION.

Of mixed possession. Where the possession of land, slaves, or other property, is joint or mixed, the law adjudges the possession to be with him who has the superior title. This general rule applies as strongly in favor of the children and other members of the father's family, as of strangers. If they actually reside with the father upon the property, it can make no difference, that he is the head of the family; claims the estate for himself and in his own right, and apparently controls it; if he have not the title, and it be in his children, the law fixes the possession with them. *Fancher v. DeMontegre*, 40.

See STATUTE OF LIMITATIONS.

PRACTICE AND PLEADING.

1. *Judicial discretion.* The Supreme Court will not, as a general rule, interfere with the rulings of an inferior court upon matters purely of discretion. To authorize such interference in any case, it must clearly appear that such discretion has been improperly exercised, and that great hardship and injustice was the result of it. *Watterson v. Watterson*, 1.

2. *Replevin. Exemptions. Act of 1846, ch. 65.* The owner of a chattel exempt from execution under the poor laws of this State, may recover the same in an action of replevin when levied upon by the sheriff under a valid judgment and execution against said owner. *Wilson v. McQueen*, 17.
8. *Tender.* In an action of debt originating before a justice of the peace, a mere offer by the defendant to the plaintiff of the sum claimed, before the issuance of the warrant, cannot be pleaded as a valid tender in bar of the action. The money should have been produced and offered also, at the time of the trial before the justice; and upon appeal to the Circuit Court, it should be brought into Court at the time of the filing of the papers, and still held ready and produced, as a continuous offer. A mere offer of the amount to the plaintiff by the defendant's counsel, in the progress of the argument in the Circuit Court, would not be a valid tender, pleadable in defence of the action. *Keys v. Roder*, 19.
4. *Traffic with slaves. Act of 1818, ch. 135, § 8.* The act of 1818, ch. 135, forbidding all traffic with slaves except for articles of their own manufacture, without permission of the owner of said slaves, does not contemplate a criminal proceeding as the mode of recovery of the fine imposed for such offence. The word "fine," as used in said act, is inartificial, and is to be understood in the sense of penalty, to be recovered by action of debt. *Kelly v. Davis*, 71.
5. *Same. Same.* The provision of the act of 1818, ch. 135, forbidding all traffic with slaves, except for articles of their own manufacture, without the permission of the owner, which appropriates the one-half of the penalty imposed by said act to the use of the person who will sue for the same, and the other half to the use of the owner of the slave with whom such unlawful traffic may be had, does not preclude the owner of such slave for maintaining the suit for such penalty himself. *Ibid.*
8. *Evidence.* Where the plaintiff in an action of debt for the recovery of a statutory penalty, voluntarily proves by his own witness that he had recovered a former judgment against the defendant for the same cause of action, without explanation, he thereby defeats his right of recovery, although the record of such former recovery be not produced. *Ibid.*
7. *Statute.* Where a statute imposes a penalty, and prescribes no form of action for its recovery, debt may be maintained. *Ibid.*
8. *Powers of municipal corporation.* A fine, forfeiture, or penalty, imposed by an ordinance of a town corporation for an offence against the municipal laws, may be recovered by warrant in debt, and the only proof required is that the particular offence has been committed. So, where a town ordinance creating a certain misdemeanor, provided

that whoever should be *convicted* of the same, should pay a certain designated fine, it is held, that a conviction, in the sense of the ordinance, is simply sufficient proof of its violation, and that the proceeding for the recovery of the fine might be by warrant in debt and a judgment thereon by the proper officer. *Meaher v. M. & A. of Chattanooga*, 74.

- 9 *Same*. Where a corporation ordinance provides that whenever complaint is made on oath to the recorder of its violation, he shall issue his warrant for the arrest of the offender; it is held that the recorder is not thereby precluded from issuing his warrant without such complaint on oath, or upon his own knowledge, that the offence has been committed. *Ibid*.
10. *Service of process upon infant defendants*. In a proceeding by an administrator, to sell land or slaves for the payment of debts, there must be service of process upon infant heirs. The answer of the guardian, *ad litem*, will not give jurisdiction. *Crippen, adm'r., v. Crippen*, 128.
11. *Administrators and executors. Sale of slaves to pay debts. Act of 1827, ch. 61, § 2*. A bill or petition by an administrator to sell slaves for the payment of debts, must be sworn to. *Ibid*.
12. *Same. Same. Act of 1789, ch. 23, § 4*. Upon a bill by an administrator, to sell land or slaves for the payment of debts, an account should be had with the administrator, exhibiting the full condition of the administration as to the assets received, or which should have been received; and of all debts and charges upon the estate paid by him, and of all outstanding debts established by legal proof, before a decree of sale is granted; and only so much should be sold as may seem necessary to pay what is legally due under said account. *Ibid*.
13. *Appeal. Arbitration*. Where the parties to a litigation in Court agree to submit the matters in controversy to the decision of arbitrators, whose award is produced in Court and simply adopted as the judgment thereof without anything more; neither party has the right of appeal to the Supreme Court. And the fact that the parties, in their article of submission, expressly reserve the right of appeal does not alter the rule. *Bone v. Rice*, 149.
14. *Contract*. The party for whose benefit an instrument not under seal is executed, may sue thereon in his own name, although the engagement be not directly to, or with him. And the same rule applies to a contract made with an agent. *Brice v. King*, 152.
15. *Trespass. In removing line fences*. In an action of trespass, for removing a line fence dividing the lands of the plaintiff from the defendant, the jury should be instructed to ascertain from the evidence whether the fence was constructed upon the land of the defendant, or the plaintiff, or whether it was upon the supposed line between them and kept up jointly, and recognized as a line fence. If such

- fence was erected upon the land of the defendant he had a right to remove it; if upon the land of the plaintiff he had no such right. If, however, it appear from all the testimony that the fence was upon the supposed line between them, and kept up jointly as a line fence, the defendant had a right to remove his part of it, upon giving reasonable notice to the plaintiff of his intention to do so. *Clowers v. Sawyers*, 156.
16. *Evidence. Common carrier.* The consignor of cotton, who is the owner thereof, may maintain his action against a common carrier for the loss of the cotton; and the consignee, who is a mere factor, may be a witness for him. *W. & A. R. R. Co. v. Kelly*, 158.
 17. *Pleas struck out. Defence under informal plea.* Immaterial pleas may be struck out by order of the Court. But if a plea be improperly struck out, and a party is permitted, under a less appropriate plea, to avail himself, fully, of all the matters of defence upon which he relies, the rejection of the plea does not constitute error affecting the merits, for which the judgment will be reversed. *Sanders v. Young & McFerrin*, 219.
 18. *Leave to file a defective plea refused.* It is not error in the Circuit Court to refuse leave, at the trial term, to file a defective plea. *Grisom v. Fite*, 382.
 19. *Non est factum.* A plea of *non est factum*, filed by the accommodation endorser of a note, which was left to be filled up by the maker, should aver that the endorsee knew at the time he received the note, that the maker was not authorized to insert the amount with which the note was filled up. The law presumes the holder of the note to have purchased for value and in due course of trade, and he could enforce the collection of it, unless he had notice of the want of authority to fill it up with the amount inserted. *Ibid.*
 20. *Motion to enter a discontinuance.* The process forms a part of the record of the cause; and, therefore, a motion is the proper form of proceeding to present the question of discontinuance. *Armstrong v. Harrison*, 379.
 21. *Rule to plead and try.* A rule to plead and try has spent its force, and ceases to have effect, after the expiration of the term of the Court to which, by its terms, it applies. *Turner v. Carter*, 520.
 22. *What the appearance term. Defence at.* The delay of the plaintiff to file his declaration has the effect of making the term at which it is filed the appearance term, so far as respects the defendant's right of making his defence. The defence can be made to the declaration, when filed, without leave of the Court. *Ibid.*
 23. *What judgment proper on demurrer. Exceptions to the rule.* In general, the proper judgment on sustaining a demurrer to a plea in

abatement, or to a replication thereto, is, that the defendant answer over. The exceptions to this rule are few, and of a highly technical character. If a plea, containing matter which can only be pleaded in abatement, improperly commences or concludes in bar; or where matter in abatement is pleaded after the *last continuance*, the judgment on demurrer may be *final*. *Ibid*.

24. *An interlocutory judgment is under the control of the Court.* Even if the judgment on a demurrer to a plea in abatement were final, still the Court possesses the power to control it, and to let the defendant in to make his defence; and it is a positive duty to do so, upon such terms as may be deemed just under the circumstances, if it is shown that the defendant has a meritorious defence. *Ibid*.

25. *Continuance. In the discretion of the Court.* Continuances are in the discretion of the Court below, and the action of the inferior Courts in granting or refusing continuances, will not be reversed unless it *clearly* appear that there has been a *very great abuse* of this discretion. *Pitts v. Gilliam*, 549.

See EXECUTION. NEW TRIAL. WITNESS. WILL.

PRINCIPAL AND AGENT.

1. *Property of principal not liable for agent's debts.* If one merely empowered as agent to purchase land for another, takes the title to himself, either intentionally or by mistake, he is not thereby vested with such a title as will subject the land to seizure and sale for the satisfaction of his debts. A Court of Equity will divest him of his title, and vest it in his principal, or direct the vendor, if a party, to execute a conveyance to the true owner of the land. *Ready v. Bragg*, 511.

2. *Parol disclaimer by agent, and title made to principal.* If, without the intervention of a Court of Equity, the agent voluntarily disclaims and renounces all interest in the estate by parol declaration merely, and by the assent of all the parties, the deed made to the agent being unregistered, is destroyed, and a conveyance be thereupon executed to the real purchaser, the latter is clothed with a valid title to the land. Nor will the application of the principle be varied by the fact that the agent, or nominal purchaser, sustains a particular relation (as that of husband) to the person for whom the purchase was really made, and by whom the consideration money was, in fact, paid. *Ibid*.

3. *Chancery jurisdiction. Superior equity.* If, by virtue of the unregistered deed to the agent, the land was subject to an execution at law against him, the equity of the principal, the wife, being superior to that of the creditors, a Court of Chancery would not actively interpose in favor of the husband's creditors, to aid them in any way in obtaining satisfaction out of the land as against the equitable right of the wife, but would dismiss them to their legal remedy. *Ibid*.

4. *Evidence. Declarations of the agent.* The acts and declarations of an agent, during the continuance of the agency, in the lawful prosecution of the business of the principal, respecting the matter in litigation, are admissible in evidence to bind the principal. *Sewanee Mining Co. v. McMahon*, 582.
5. *When agent's authority ceases. Notice.* The power and authority of the agent of a railroad company to receive subscriptions for stock, ceases when the subscription is complete. When made, the subscription instantly inures to the benefit of the company, and creates, in law, a contract directly between the subscriber and the company. The agent has no power to abrogate or annul the subscription; and, consequently, notice of an intention to revoke it must be given to the company, and not to the agent. *Low v. E. & K. Railroad Co.*, 659.

See CRIMINAL LAW. FRAUDULENT CONVEYANCES.

PRINCIPAL AND SURETY.

Levy. Certiorari and supersedeas. Where an execution has been levied upon enough of the principal's goods to satisfy the debts and costs, it is of itself a satisfaction, so far as the surety is concerned; and if such levy be abandoned, and the surety's goods be levied upon, he is entitled to his discharge upon writs of *certiorari* and *supersedeas*, showing his suretyship by proof. *Finley v. King*, 128.

See CONSTABLE.

PROCESS.

1. *Service of.* Counterpart of a summons was issued against Garret H. Graham, administrator of John Graham, deceased. The sheriff executed said writ on Jared H. Graham, administrator of John Graham, deceased, and made due return thereof. The latter was the *real* party, but his name was not properly given in the writ. Held, that this was a valid service of the summons on Jared H. Graham, and he was guilty of gross negligence in not, at once, making his defence, if he had any. *Graham v. Roberts and Wright*, 56.
2. *Same. Waiver.* The sheriff stated to the defendant that he knew no such man as Garret H. Graham; and when asked by Jared H. what he intended to do, he replied that he should return the summons with the *facts* upon it. Jared H. Graham was at Court. Under the advice of counsel he failed to make defence, and judgment by default was taken against him. He was fully apprised of the judgment by default before final judgment—appeared and defended the case upon the trial, at the execution of the writ of inquiry—introduced evidence—made various motions in the case, and filed a bill of exceptions. He failed to have the judgment by default set aside. This was a waiver of the service of process, if not served, and he could not thereafter be heard to say that it was not executed on him. *Ibid.*

3. *Judgment by default set aside for want of service of process.* If judgment by default is taken against a party without service of process, the Court has power and will set aside such judgment, upon a proper application made by such party. *Ibid.*

See CHANCERY JURISDICTION. PRACTICE AND PLEADING.

PROSECUTOR.

See CRIMINAL LAW.

QUESTIONS RESERVED.

See CONSTABLE. CRIMINAL LAW. REPLEVIN. RAILROAD COMPANY. SLAVES. TRUST AND TRUSTEE. WITNESS. WILL.

RAILROAD COMPANY.

1. *Conditional subscription of stock. Revocation of subscription. Notice.* A party who makes a conditional subscription of stock to a railroad company, by agreement with a person who is not the authorized agent of said company, may withdraw or revoke his subscription at pleasure, without notice to the company, at any time while the subscription book remains in the hands of such person, and before the company has acquired any right to or interest in it. *Lowe v. E. & K. Railroad Company*, 659.
2. *Question Reserved.* The weight of authority is, that a party who makes a conditional subscription of stock to a railroad company, is bound, if the condition is ultimately performed, unless there is an express revocation by him; but this question is not authoritatively determined in this case. *Ibid.*

RECOGNIZANCE.

See CRIMINAL LAW.

REDEMPTION.

1. *Fraud.* If the debtor is prevented from redeeming his land, by the fraud and artifice of the purchaser, until the expiration of the time allowed by law to redeem, such omission of the debtor will not prejudice his rights; and a Court of Equity will permit him to redeem. *Guinn v. Locke*, 110.
2. *Mortgage.* If a party purchase, or redeem land as the agent, or for the benefit of the debtor, the relation of mortgagor and mortgagee is thereby established. And this relation may be shown by parol, although the purchaser may hold by a sheriff's deed, or other absolute conveyance. *Ibid.*

3. *Same. When subject to redemption in the hands of a third person.* If a third person takes a conveyance of the land thus subject to redemption, in payment of a pre-existing debt, or with actual notice of such equity, it may be reached, in the hands of such third party, by the redeeming debtor. *Ibid.*
4. *Same. Tender. Payment of money into Court.* Where, by the proof, the relation of mortgagor and mortgagee is established, it is not necessary to bring the money into Court. In such case, if, upon an account, the mortgagor cannot pay the balance found due, the mortgaged estate is sold for the payment of the debt, and the surplus paid to the mortgagor. *Ibid.*

REFERENCE TO THE MASTER.

See CHANCERY PRACTICE.

REGISTRATION.

See MORTGAGE.

RELEASE.

See EVIDENCE.

REMAINDER AND REVERSION.

See CHANCERY JURISDICTION. DOWER. LIFE ESTATE. STATUTE OF LIMITATIONS. SLAVES. TRUST AND TRUSTEE.

REPLEVIN.

1. *Jurisdiction of justices of the peace. Acts of 1851, and 1854.* By the act of 1851, ch. 82, jurisdiction is conferred upon justices of the peace in actions of replevin, if the amount in controversy does not exceed fifty dollars. This act is not repealed by the act of 1854, ch. 60. Both acts may well stand together, and implied repeals are not to be encouraged. *Hockaday v. Wilson*, 118.
2. *Jurisdiction. Justice of the peace. Appeal.* A justice of the peace has no jurisdiction in an action of replevin, to render a judgment in favor of the plaintiff for more than fifty dollars; and he cannot render a judgment for a larger amount in favor of the defendant. On appeal, the jurisdiction of the Circuit Court is limited to the jurisdiction of the justice, and no judgment can be rendered by the former tribunal that could not be rendered by the latter. *Gray v. Jones*, 542.
3. *Same. Value of the property.* In an action of replevin, the plaintiff may fix an estimate of value upon the property, at a less sum than the real value, and within the jurisdiction of a justice of the peace.

But he is bound by this valuation voluntarily made, and if the property is not restored to his possession by the writ, he cannot recover, on the trial, a greater amount than the value thus fixed, and laid in the warrant. *Ibid.*

4. *Question reserved.* Whether, when an inadequate estimate has been placed by the plaintiff upon the property, and the verdict is for the defendant, and the value of the property fixed by it at a sum beyond the jurisdiction of the justice, judgment can be rendered for the amount of the verdict. *Ibid.*

See PRACTICE AND PLEADING.

REPLICATION.

See CRIMINAL LAW.

RESPONDEAT OUSTER.

See CRIMINAL LAW.

ROADS.

Of the appointment of overseers, and allotment of hands. *County Court. Act of 1835, ch. 6, § 2.* The classification of public roads in this State, and the allotment of hands to overseers, cannot be done by a less number than twelve, or one-third of the justices of the County Court. The mere appointment of overseers is a very different duty, and may be done by the Quorum Court or the County Judge. *Sloan v. Hannah, 43.*

RULE TO PLEAD AND TRY.

See PRACTICE AND PLEADING.

SALE OF REAL ESTATE.

1. *Chancery. Deraignment of title. Executed and executory contracts.* If the purchaser of a tract of land accepts a deed with covenants of warranty, and has possession, he cannot ask for a deraignment of title, as he could if his contract was executory. *Young v. Butler, 640.*
2. *Same. Covenant against incumbrances.* It is incumbent on the vendee of real estate, before he can rely upon a breach of a covenant against incumbrances, to aver and prove the paramount title with all the particularity required of a plaintiff in an action of ejectment. *Ibid.*
3. *Same. Covenant of seisin.* Upon covenants of seisin and right to convey, the vendee must, before he is entitled to any relief, by averment and proof, negative the words of the covenant. *Ibid.*

4. *Same. Eviction. Fraud. Insolvency of the vendor.* If the vendee of real estate accepts a deed with covenants of warranty, a Court of Chancery will not rescind the contract or stay the collection of the purchase money, for a mere defect of title, if the case be free of fraud and the vendor is solvent, but will leave the party to his remedy upon the covenants taken. If the covenants have been actually broken, and the vendor is insolvent, a Court of Equity may restrain him from proceeding to collect the whole amount of the purchase money, and may set-off the damages occasioned by the breach of the covenants against such unpaid purchase money. *Ibid.*
5. *Chancery. Joint purchase.* If two or more persons make a joint purchase of real estate, each is entitled to participate equally in profit and loss, without regard to equality in payment of the purchase money; but the property thus purchased will be held bound for any excess paid by one over another. *Rankin v. Black, 660.*
6. *Same. Partition.* If one of the joint purchasers dies, a proceeding to sell the real estate thus purchased, to equalize the payments, does not fall within the rules applicable to sales for partition, and for the payment of debts, requiring proof, an account, &c. It is in the nature of any other original suit in chancery, and governed by the same rules of practice. *Ibid.*
7. *Same. A cross-bill by the minor cures defects.* If real estate is sold upon informal proceedings, and a minor defendant files a cross-bill by *prochein ami*, and has the sale set aside, and a re-sale ordered, his position as defendant is changed, and any defects that existed in the proceedings on the original bill, cannot affect the validity of the second sale. *Ibid.*
8. *Same. Sale will be sustained if to the interest of the minor.* If real estate, in which a minor is interested, is sold under a decree of Court, and the proceedings are not void, but merely voidable, the sale will be sustained if most advantageous to the minor. If it is absolutely void, it cannot be confirmed. *Ibid.*

See CHANCERY. CHANCERY PRACTICE. CONSIDERATION. SCHOOL LANDS. TRUST AND TRUSTEE.

SCHOOL LANDS.

1. *State holds them as trustee.* The title to the lands in Tennessee, set apart by Congress for the use of schools, vested in the State as a corporation, coupled with a trust. The State is merely a trustee in relation to these lands, bound by the restrictions of the acts of Congress, and the children of the respective townships are the beneficiaries. *Goodman v. The Tenn. Mining Co., 172.*

2. *Lease of. School Commissioners. Case in judgment.* The school commissioners have no power to lease the school lands for a longer period than is prescribed by law. If a lease is made for a longer term than the law authorizes, it is void, and will be set aside upon a bill in equity. The act of 1848, ch. 46, passed by Congress, authorized the Legislature, in case it should be deemed inexpedient to sell them, to make provision for leasing the school lands for any term *not exceeding four years*. The Legislature, by the act of 1850, authorized the lease of the unsold school lands in Polk county, but fixed no limit as to time. The school commissioners for the 8th district of said county leased their school lands for the period of ninety-nine years. Held, that said lease is in contravention of the act of Congress, and void. *Ibid.*
8. *Sale of. Case in judgment.* A sale of school lands previously leased is unauthorized by law, and the sale is void; and this is so, although the lease itself may be a nullity. By the act of 1848, ch. 356, Congress authorized the State, upon certain conditions, to sell the school lands. The Legislature, by the act of 1844, ch. 104, amended by the act of 1846, ch. 121, in pursuance of the power given by Congress, made provision for the sale of these lands. Under these acts certain school lands in Polk county were sold, and the sale confirmed; but before the sale was made, the school commissioners, under the act of 1850, leased said lands for ninety-nine years. Held, that the sale was void, and communicated no title to the purchaser. *Ibid.*
4. *Grant. By whom questioned.* A person whose claim or interest originates subsequent to the issuance of a grant by the State cannot question its validity; but it may be set aside in favor of an older special entry upon which a younger grant has issued. This principle does not affect the title to the school lands. The title to them is older, and is held by the State and commissioners, as trustees for the common schools of the township in which they are located. *Ibid.*

SCHOOL COMMISSIONERS.

See SCHOOL LANDS.

SEDUCTION.

- 1 *Evidence.* The father's claim for damages for the seduction of his daughter, and the allowance made under the bastardy laws to the daughter for the support of the bastard child, are separate and distinct things. The one cannot be used as a bar to, or in mitigation of the damages justly arising under the other. Thus, in an action by the father for the debauching of his daughter, it is error to permit a receipt for the sum paid by the defendant to the daughter, under the bastardy allowance for the support of the child, to be read in evidence, when the plaintiff was in no way connected therewith, although such receipt purported to be in full acquittance of all claim for damages on account of the seduction. *Sellers v. Kinder*, 124.

2. *Evidence. Statute of limitations.* On a trial for seduction, evidence of a criminal connection between the daughter and defendant, is not limited to the period of three years from the commencement of the suit. The whole of the party's intercourse with the person seduced, and all the circumstances of the case are to be regarded as an entire transaction, and are admissible as evidence, as well in view of the question, whether the defendant is the father of the child, as to show the extent of the injury in aggravation of the damages. *Thompson v. Clendening*, 287.
3. *Same. Character of the person seduced.* Evidence of the general character of the person seduced is admissible, but this inquiry must be restricted to her general reputation as to chastity at the time of, and prior to her seduction. *Ibid.*
4. *Same. Plaintiff's character.* When the father sues for the seduction of his daughter, it may be shown that he is a man of profligate character and dissolute habits. This, however, must be done by evidence of his general reputation, and not by proof of particular instances. *Ibid.*
5. *Same. Character of the plaintiff's family.* The reputation of a particular member of the plaintiff's family, other than the plaintiff or the person seduced, cannot be inquired into; but the general reputation and standing of the family may be shown by the plaintiff with a view to enhance, or by the defendant to diminish the damages. *Ibid.*

See MARRIAGE CONTRACT.

SET-OFF.

Statute of limitations. Promissory note. A debt barred by the statute of limitations cannot be allowed as a set-off, unless the bar of the statute is waived. If the claim relied on as a set-off, is spoken of in the record as a "note," it must be taken to have no seal; and, if barred by the statute of limitations, cannot be allowed. *Stone, adm'r.*, v. *Duncan*, 103.

SHERIFF.

1. *What amounts to a payment.* A sheriff or other collecting officer has no power to receive anything in satisfaction of a claim placed in his hands for collection but money, or bank notes circulating as such, without authority from the plaintiff. A payment in any other way is no satisfaction of the judgment, and the plaintiff may proceed against the debtor. *Draper v. McLellan*, 262.
2. *Is liable to the plaintiff. Deputy.* The officer, however, would have no right to make this objection in a proceeding against him. His liability would be the same as if he had received the money. And upon principle, an officer would be bound to the same extent, by the act of his deputy. *Ibid.*

3. *Sureties not bound.* Sureties are only bound for the official acts of their principal, and may go behind the act and test their liability by the real transaction. They may show that the act complained of was outside of, and not authorized by his office. If so, they are not liable. *Ibid.*

See EXECUTION.

SLAVES.

1. *Emancipation.* At common law no deed or writing of the owner was necessary to give the slave his right to freedom. Acts *in pais*, from which freedom might be implied, have been held sufficient, and, as between the master and the slave the same rule now prevails in this State, though the right to freedom will remain inchoate until the State gives her assent. *Abram v. Johnson*, 120.
2. *Same.* *What an act of emancipation.* The presentation by the master of a petition to the County Court for the liberation of his slave, and giving bond to indemnify the county, gives the most decisive evidence of the wish and intention of the master to emancipate, and is in itself a complete act of freedom on his part. The slave becomes at once invested with his right to freedom; and a mortgage of the slave made afterwards, with a full knowledge of the facts on the part of the mortgagee, will not be allowed to defeat that right, but it may be asserted and decreed upon the terms and conditions prescribed by the statutes upon the subject. *Ibid.*
3. *At the risk of the hirer.* *Fraud and warranty.* The health and life of a hired slave, in the absence of fraud or a warranty on the part of the owner or his agent, are at the risk of the hirer. And this is so whether the slave, at the time of the hiring, was sound or unsound. The hirer is bound for the hire, although the slave die immediately after he gets him into possession. *Dickenson v. Cruise*, 258.
4. *Dower in, under the law of Virginia.* *Forfeiture by removal.* By the law of Virginia, a widow has a right to dower in the slaves of her husband. If she remove the slaves of which she is thus endowed, from the State, without or against the consent of those entitled to the reversionary interest, she forfeits her life estate in them. But the consent of the husband of a reversionary *feme covert*, is her consent, and will save the forfeiture. *Crittenden v. Posey*, 811.
5. *Husband and wife.* *Assignment of wife's reversionary interest in slaves.* *Law of Virginia and Tennessee.* No assignment, by the husband, of the wife's reversionary interest in slaves, though it be vested, and though the assignment be for a valuable consideration, will defeat her right of survivorship, if he die in her lifetime and while such interest is reversionary. The rule of law is the same, both in Virginia and Tennessee. *Ibid.*

6. *Same. Same. Fraud of the wife.* If it be shown, affirmatively, that the wife fraudulently induced the purchase of the slaves, she would be *estopped* from asserting her right to them. *Ibid.*
7. *Measure of damages on breach of warranty of title.* The measure of damages in a suit for a breach of a covenant of warranty of title in the sale of a slave, is the consideration money and interest. *Ibid.*
8. *Same. Interest not computed while title good.* Where the title is good for a certain period, interest is not to be computed until the termination of the time for which the title is good. Thus, if an absolute estate in a slave is conveyed by a person having only an estate *pur auter vie*, the title being good for a certain period, the vendee is entitled to the consideration paid, with interest, *only*, from the termination of the life estate thus held by the vendor. *Ibid.*
9. *Question reserved.* How far the existence of fraud on either side, would affect the question as to the measure of damages, does not, properly, arise, and is not decided. *Ibid.*
10. *Rule in fixing value. Evidence.* The owner of a slave, whose life has been unlawfully taken, is entitled to recover his market value, considering his age, appearance, health, and general traits of moral character; but evidence of an alleged crime, for which he has been committed to jail, but not tried, is inadmissible. The law presumes him innocent until his guilt is made to appear legally, and his value should be ascertained upon this legal presumption. *Folk, Wilson & Co., v. Fancher*, 888.
11. *Exemplary damages.* In suits for injuries to personal property, the jury is not restricted to the pecuniary loss of the plaintiff if the case is one of wantonness and cruelty. In such cases the damages should be such as not only to compensate the plaintiff, but to operate as a punishment of the defendant, and an example to deter others from the commission of like offences. *Ibid.*
12. *Same. Case in judgment.* A slave was charged with the crimes of rape and murder—was arrested and committed to jail to await his trial. The defendants broke open the jail, took the slave from the custody of the law and hung him. Held, that it is a case of extraordinary aggravation, in which the law was set at defiance, public justice insulted, and the life of a human being, already in manacles, lawlessly taken, and calls for exemplary and vindictive damages; and evidence of said charges is not admissible in ascertaining the value of the slave. *Ibid.*
13. *Parol sale of remainder interest void.* A remainder interest in slaves is incapable of delivery during the continuance of the life estate, and a valid disposition of such interest can only be made by deed or other writing. It cannot be done by parol. *McDonald v. McDonald*, 888.

14. *Conversion. Trover and case.* To constitute a conversion, there must be a positive tortious act. A mere non-feasance or neglect of some legal duty will not suffice to support trover, although it may constitute sufficient ground to maintain an action on the case. Hence, although the tacit consent of a person to receive the services of the slave of another, for some purposes, might be equivalent to a previous command, it would not amount to a conversion of the slave. *Jones v. Allen*, 626.
15. *Constructive conversion.* The doctrine of constructive conversion, as applied to slaves, must be carefully guarded, or its operation will be extremely mischievous. *Ibid.*
16. *Possess the two-fold character of persons and property. Act 1808, ch. 18, § 8. Act of 1831, ch. 108, § 1.* Under our modified system of slavery, slaves are not mere *chattels*; but are regarded in the two-fold character of persons and property. As persons they are accountable moral agents, possessed of the power of volition and locomotion, and clothed with certain rights by positive law and judicial determination. Other privileges and indulgences have been conceded to them by the universal consent of their owners. Such as being sent to perform those neighborly offices common in every community; being allowed, by universal sufferance, at night, on Sundays, holidays, and other occasions, to go abroad, to attend church, &c. And the police regulations, established by the acts of 1808, ch. 18, § 8, and 1831 ch. 108, § 1, have no reference to such usages. *Ibid.*
17. *Same. Same. Verbal consent of the owner.* If it were conceded that a person who permits the slave of another to come or remain on his premises, without a *written pass* from his master, is guilty of a violation of the act of 1808, nothing can be predicated of it more than that he incurs the pecuniary penalty prescribed for such violation of the act. Although in a suit to recover the penalty, the party may not defend himself upon the ground of the parol license of the master, yet, in a civil suit, such verbal consent would be a sufficient defence, and this may be established either by direct evidence, or be implied from circumstances. *Ibid.*
18. *Injury resulting from furnishing liquor to a slave.* If a person furnishes liquor to the slave of another, he may not only be held amenable for a violation of the statute; but, if the slave should become intoxicated thereby, and, as an immediate consequence of this drunkenness, should suffer injury, such person would be amenable to the master, but not as for a conversion. *Ibid.*

.See DOWER. EVIDENCE. PRACTICE AND PLEADING.

SPECIFIC PERFORMANCE.

1. *Abatement of price.* The purchaser of land, if he chooses, is entitled to have the contract specifically performed, as far as the vendor can perform it, and to have an abatement of the purchase money for any deficiency in the title to the land. If the title is, in part, defective, the vendor cannot require the vendee to annul the contract as to the whole; but the vendee may, if he chooses, retain the land so far as the title is perfect. *Collins v. Smith*, 251.
2. *Doubtful title.* A Court of Equity will not compel a purchaser to take a doubtful title to land. Before the vendor can require the purchaser to execute the contract, he must show that he is in an attitude to make him a good title. *Ibid.*

STATUTE OF LIMITATIONS.

1. *Act of 1715, ch. 48, § 9, protects heirs and representatives.* The act of 1715, ch. 48, § 9, is an absolute bar of all claims of creditors after the lapse of seven years, and it protects heirs and distributees, as well as administrators and executors, *Stone v. Sanders*, 248.
2. *Same. No exception as to insolvent estates.* The statute makes no exception in favor of claims filed under the insolvent acts, and the Court can make none. All are alike barred. *Ibid.*
3. *Same. Case in judgment.* The intestate died in 1848. His administrator suggested the insolvency of the estate. The debts of the complainants were filed under the insolvent acts. Upon settlement with the clerk, in 1859, the administrator had only \$98 of assets in his hands. Certain slaves were recovered by the distributees of the intestate, and sold for division in 1856. In October, 1857, the complainants filed their bill to subject the proceeds of said slaves to the payment of their debts. Held, that they were barred by the act of 1715, and the bill was properly dismissed on demurrer. *Ibid.*
4. *Adverse possession.* The possession of slaves by the tenant for life, is in perfect harmony with, and incapable in law of becoming adverse to the rights of the remaindermen. The possession of a purchaser of the life estate is precisely similar to the possession of his vendor, and he cannot acquire a valid title, as against the remaindermen, to the slaves, by an adverse holding. Neither will the statute of limitations commence running until the death of the tenant for life, because the right of the remaindermen to the possession of the slaves did not sooner accrue to them. *Woodson v. Smith*, 276.
5. *Adverse possession of the wife.* The adverse possession of a slave by a *feme covert* for three years, under a parol gift from her father, vests an absolute title to such slave in her, by operation of the statute of limitations. *Wade v. Cantrell and Tubb*, 348.

6. *Possession as between bailor and bailee. Rule in North Carolina.*
The transactions involved in this suit were in North Carolina, and the rights of the parties are governed by the laws of that State. It is settled there, that if a parent puts property in the possession of a child who has left, or is about to leave the parent, such property is presumed to be given and not loaned to the child, and purchasers and creditors can subject it to their claims, whatever may have been the private understanding of the parties. But this is a presumption of fact and not of law. Therefore, between the parties and all others who cannot impute either legal or actual fraud to the transaction, the true character of the act may be shown. And if the loan is established as a matter of fact, the statute of limitations will not operate upon the husband's possession, although he had sold some of the negroes as his own, and notwithstanding his declarations that he held for himself. He cannot, by his own act, throw off his character of bailee. *Ingram v. Smith*, 411.
7. *When it begins to run.* The purchaser thus having a right of action, upon being dispossessed or offering to return the property, the statute of limitations begins to run, and will bar his right of recovery on the warranty, against his vendee, after the lapse of six years. *Word v. Cavin*, 506.
8. *By what law regulated.* Each state has the right to settle the time within which suits must be brought, or may be litigated in its own Courts. Hence, the law of the state where a suit is instituted, without regard to where the cause of action originated, governs, as to defences upon prescription or limitation of actions. *Gassaway v. Hopkins*, 583.
9. *When it begins to run against a title in remainder to slaves held as dower under the law of Kentucky.* Though the husband may forfeit his interest in slaves of which his wife is endowed by the law of Kentucky, the wife may reclaim such interest if she survive her husband. The remainderman, however, is not bound to urge the forfeiture, and in that event, time will not commence to run, to the prejudice of his right, until the life estate terminates. *Ibid.*
10. *Infancy. Injuries to the person.* A party who has received an injury during minority may sue by *prochein ami* at any time during his infancy; or, he may decline doing so, and bring his suit within one year after arriving at age. His delay for a period of eighteen years to bring suit, though a matter, if not accounted for, proper to be taken into consideration by the jury in estimating the damages, can have no influence upon the question, as to his right to maintain the action. *Whirley v. Whiteman*, 610.

See BOUNDARY. CHANCERY PRACTICE. SET-OFF. SEDUCTION.

STAY OF EXECUTION.

1. *Order for stay.* Written authority to the justice to enter the party's name as stayor, must, upon its face, contain such reference to and description of the judgment, the execution on which is intended to be stayed, in some one or more particulars, as without the aid of extrinsic evidence will render it reasonably certain that the judgment referred to in the written authority is the identical judgment to which the stayor intended to become surety. *Cannon v. Trail*, 282.
2. *Extrinsic evidence.* When the written authority thus indicates the judgment with reasonable certainty, extrinsic evidence is admissible to aid the defective description, and identify, with more certainty, the judgment referred to in the order. *Ibid.*
3. *Case in judgment.* The defendant executed the following writing :
 "Mr. Galbreath, Esq. You may set my name as stayor to a debt against John M. Warner, for about four hundred dollars, in favor of Leta Cannon, in the hands of C. A. Warner. July 20th, 1857."
 "F. TRAIL. [SEAL.]"
 It is held, that this is specific enough to authorize the introduction of parol evidence to aid the defective description, and, if properly identified, the party would be bound as stayor. *Ibid.*
4. *Written authority to the justice. Estoppel by deed.* If a party authorize a justice to enter his name as stayor to certain judgments, by an informal instrument of writing which does not bind him, but at the same time accepts a mortgage from the judgment debtor to indemnify him as such stayor, he is *estopped* by the recitals of the deed to deny his liability. *Morgan & Co. v. Cooper*, 480.

See CONSTABLE.

STATUTES CITED AND CONSTRUED.

1852, ch. 365,	Jurisdiction,	-	-	-	-	68
1801, ch. 6, § 53,	Bill of review,	-	-	-	-	460
1856, ch. 71,	Cross-action,	-	-	-	-	265
1849, ch. 17,	Charters,	-	-	-	-	24
1848, ch. — § 12,	Bank of E. Tenn,	-	-	-	-	146
1827, ch. 80, § 2,	Continuance,	-	-	-	-	49
1833, ch. 10,	Horse racing,	-	-	-	-	154
1801, ch. 30,	Prosecutor,	-	-	-	-	389
1801, ch. 5, § 82,	Depositions,	-	-	-	-	373
1784, ch. 22, § 8,	Dower,	-	-	-	-	348
1848, ch. 173,	Venue,	-	-	-	-	260
1756, ch. —	Book debt,	-	-	-	-	47
1762, ch. 5, § 13,	Lease,	-	-	-	-	21
1825, ch. 81,	Lien,	-	-	-	-	394
1856, ch. 77,	Lien,	-	-	-	-	394

1801, ch. 6, § 59, New trial,	-	-	-	-	169
1784, ch. 22, § 6, Descent,	-	-	-	-	353
1846, ch. 65, Replevin,	-	-	-	-	17
1818, ch. 185, § 3, Slaves,	-	-	-	-	71
1827, ch. 61, § 2, Sale of slaves,	-	-	-	-	128
1789, ch. 28, § 4, Sale of slaves,	-	-	-	-	128
1835, ch. 6, § 2, Roads,	-	-	-	-	43
1715, ch. 48, § 9, Statute of limitations,	-	-	-	-	243
1856, ch. 75, Motion,	-	-	-	-	436
1794, ch. 1, § 29, Witness,	-	-	-	-	341
1835, ch. 20, § 16, Writ of error,	-	-	-	-	385

SUMMARY PROCEEDINGS.

Judgment. Accommodation endorser. Act of 1856, ch. 75. By the act of 1856, ch. 75, the remedy by motion is given only in favor of an *accommodation endorser*, and a judgment by motion, under that act, is defective unless it shows that the plaintiff is an *accommodation endorser*. *Allen v. Wood*, 436.

SURETIES.

See PRINCIPAL AND SURETY. SHERIFF.

TENANTS IN COMMON.

See LEASE.

TENDER.

See PRACTICE AND PLEADING. REDEMPTION.

TITLE.

See CHANCERY PRACTICE. SPECIFIC PERFORMANCE. SALE OF REAL ESTATE. WRIT OF ERROR.

TROVER.

See DAMAGES. SLAVES.

TRESPASS.

See PRACTICE AND PLEADING.

TRESPASS QUARE CLAUSUM FREGIT.

See GUARDIAN AND WARD.

TRUST AND TRUSTEE.

1. *Trustee takes an estate co-extensive with the objects of the trust. When the estate ceases.* An estate co-extensive with the duties to be performed, will vest in the trustee, and he will take *exactly* that quantity of interest which the purposes of the trust require, which being executed, the *trust estate ceases*. *Smith v. Metcalf*, 64. ✓
2. *Same. Same. Case in judgment.* Property was bequeathed, to be under the control and direction of the executor, for the benefit of the legatee, who was a *feme covert*. She died, leaving a husband and children surviving. Held, that the executor took an estate during the life of the *feme covert*—that, at her death, the estate ceased, and the trustee could not, thereafter, maintain an action to recover said property. *Ibid*.
3. *Trust may be created by parol.* A trust in slaves may be created by parol. *Saunders v. Harris*, 185.
4. *Acceptance by the trustee and cestui que trust.* A deed of trust being made for the benefit of the *cestui que trust*, the assent of the trustee is not necessary to its validity. If he refuse to execute the trust, a Court of Chancery will execute it for him. The assent of the *cestui que trust* may be given at any time after the deed is made, and will always be presumed in the absence of proof to the contrary. *Ibid*.
5. *Terms that exclude the marital rights. Case in judgment.* If an absolute bill of sale of slaves is made by a *feme sole*, in contemplation of marriage, for the sole purpose of securing said slaves to her, free from the acts of her intended husband, a trust is thereby established in favor of the wife. In 1818, certain slaves were conveyed by a *feme sole* to her brother, in contemplation of marriage, for the purpose of securing said slaves to herself, free from the control and debts of her husband, after marriage. The conveyance was absolute upon its face. After the marriage, the husband recognized the right of his wife to the slaves conveyed. Held, that this was a valid trust, and that the slaves were secured to the sole and separate use of the wife, and belonged to her upon the death of her husband, she surviving. *Ibid*.
6. *Sale of land. Purchase by next friend.* A person assuming a fiduciary relation toward another, in regard to property, is bound to exercise for the benefit of the *cestui que trust*, all the rights, powers, knowledge, and advantages of every description, which he derives from the position, or acquires thereby. These duties cannot be performed by a *next friend*, who also becomes the purchaser of the property. The two relations are repugnant and a Court of Chancery will not allow them to be united in the same person. *Collins v. Smith*, 261. ✓

- 7 *Case in judgment.* Land was sold under the decree of the County Court. The next friend of the minors became the purchaser. He subsequently sold the land, which passed into the hands of other parties. The complainant became the purchaser of the land thus sold, but, before payment of the purchase money, filed a bill for a rescission of the contract, as to the interest of said minors, because of the doubtful character of the title. Held, that the complainant is entitled to hold the land so far as the title is perfect, but the next friend of the minors had no right to become the purchaser, and the sale, as to them, is void; and the complainant is entitled to have an abatement of the purchase money, to the extent of the defect in the title. *Ibid.*
8. *Effect of purchase, by the trustee, with the trust fund.* Where the trustee purchases an estate with the trust fund, the *cestui que trust* is entitled to the benefit of the purchase; and is not restricted to a mere equitable lien upon the estate for the money advanced. The right of the *cestui que trust* becomes one of ownership of the land, and not one of lien upon it for the money paid by the trustee. *Wilkinson v. Wilkinson*, 305. ✓
9. *Husband and wife. Trust fund used by the husband.* If the husband becomes the debtor of the wife by the use of the trust fund secured to her, and with his own means purchase and have conveyed to her separate use, property, or erect improvements upon her real estate, in payment of what he owed her, a creditor of his cannot question the validity of such conveyance, or subject said improvements to the payment of his debt. In such case the wife's equity is superior to that of the creditors of the husband. *Ibid.*
10. *Guardian. Misapplication of money.* If a guardian or other trustee agree to do an act which in itself is a manifest breach of trust, and the party who concurs in the act has notice of the trust, neither party will be heard in a court of justice to insist upon the performance of such act. *Lancaster v. Allen*, 326.
11. *Same. Same. Case in judgment.* The defendant in error held a note on the plaintiff in error, as guardian, &c. He purchased a mule and some plank of the plaintiff in error, and agreed that it should go in satisfaction of said note; but subsequently refused to do so, and sued on the note. Held, that such an application of the ward's money would have been a wilful misapplication of the trust fund, and would have involved both parties in a direct breach of trust, and neither party can enforce the agreement. *Ibid.*
12. *Question reserved.* The question as to whether, if the executory agreement had been actually carried into effect by applying the price of the plank and mule as a payment on the note, such payment, as against the guardian, would have been good or not, is not decided. *Ibid.*

13. *Continuation of the trust. Construction. Separate use.* The exigencies of the trust created by the deed and will require, and such was the intention of the father that the trust should be extended after the death of Margaret Hinds, that her heirs may be permitted to enjoy "the rents and profits, and emoluments of the land, and the profits and increase of the negroes." The heirs might be daughters, in which event the donor and testator continues the separate estate, and for this purpose the trust is still necessary. *Gardenhire v. Hinds*, 402.
14. *Tenant for life quasi trustee.* A tenant for life is a *quasi* trustee for the remainderman, but is not so in the sense of a pure trust, as a personal representative, guardian, &c. In cases of pure trusts the fund is held *solely* for the benefit of the *cestui que trust*. But a tenant for life has a limited interest in the fund, with a right to use and enjoy the profits of it without accounting for the same to any person. *Vaden v. Vaden*, 444.

See SCHOOL LANDS.

WARRANTY.

1. *Of soundness in sale of slave. Evidence. Consideration. Merger.* In an action upon a verbal warranty of soundness in the sale of a slave it appeared, that after said sale, and after the death of the slave, the vendor had executed an instrument under seal to the vendee, reciting the previous sale, and verbal warranty of soundness, "that the same had not been reduced to writing, and that he now warrants said slave to have been sound at the time of said sale; and it is held, that said instrument was not obligatory upon the vendor as a written warranty, but was a mere recognition of the previous verbal warranty; that the original parol contract was not merged in the written instrument, and that the same was competent evidence to be considered by the jury in proof of said verbal warranty. *Cameron v. Ottinger*, 27.
2. *Words that amount to a warranty. Personal liability of commissioner.* The plaintiff in error sold certain slaves to the defendant in error, as commissioner under the order of the County Court. He executed to the purchaser an instrument of writing, in which he used this language: "Said negroes sound in body and mind, and slaves for life." This is a warranty of the soundness of said slaves, and renders the commissioner personally liable on said warranty. *Kearley v. Duncan*, 397.
3. *When the law implies a warranty of title in the sale of personal property.* If a party sells *personal* property, of which he is owner at the time, and which is in his possession, without any express warranty of title, the law implies such warranty, and the seller is responsible to the purchaser, in damages, for the breach of such implied undertaking. *Word v. Cavin*, 506.

4. *Warranty implied if not expressed in the written contract.* If the contract of sale is in writing and under seal, and does not contain any express covenant as to the title, yet the law, in order to give a proper force and effect to the contract, and to discourage dishonesty and bad faith, will create and supply, as a necessary result and consequence of the contract, the covenants of warranty of title. *Ibid.*
5. *When there is a breach of the warranty of title.* A warranty of title, either express or implied, in view of the law, is broken the instant it is made, if the title were in a third person. Upon the possession of the property being lost, or upon a voluntary offer to restore it to the seller in disaffirmance of the contract, the purchaser has an immediate right of action upon such warranty. *Ibid.*

See CONTRACT. SLAVES.

WAIVER.

See CONVERSION. PROCESS.

WILL.

1. *Testator's knowledge of contents. Evidence. Practices.* The fact that an illiterate testator had knowledge of the contents of the paper propounded as his will, must be shown by such testimony as is satisfactory to the jury; but it is not indispensable that it should appear that such knowledge was acquired from hearing the will read. In a case, however, where the testator could not write or read writing, and the draftsman of the will was the principal legatee, the jury, upon such a question, should be instructed, that information acquired from the draftsman would not be sufficient. In all suspicious cases, the testimony as to the testator's knowledge should be clear and convincing; equivalent, at least, to having heard the will read by a disinterested and unimpeachable party. *Watterson v. Watterson*, 1.
2. *Construction.* The words, "lawful heirs of his body," in the following clause, to wit: "To my son, Lodwick Vaden, I lend two negroes, Lucy and Harry, and increase, during natural life, and, at his death, to be equally divided between the lawful heirs of his body," are words of purchase, and means children. Lodwick Vaden, therefore, took only a life estate in said slaves—remainder to his children. *Vaden, adm'r, v. Hance*, 800.
3. *Construction. Per stirpes and per capita.* The testator's will contained the following clause: "I give and bequeath to my daughter, Tracy Spicer, during her natural life, two negroes, Daniel and Hasty, which negroes, after her death, and the death of her husband, I give, to be equally divided between the heirs of my son Jesse, and daughter Polly Ingram." By the proper construction of this clause, the remainder created goes equally to the heirs of the son and daughter named, who take *per capita* and not *per stirpes*. *Ingram v. Smith*, 411.

4. *Same. Persons answering the description at the time the right accrues will take.* In order to give effect to the bequest to the heirs of the son and daughter, it is not necessary that they should have had children at the time of the execution of the will. It is sufficient, and the bequest is valid, if there are persons to answer to the description when it is to take effect. *Ibid.*
5. *Question reserved.* If a nuncupative will is admitted to probate, although not executed according to the requirements of the act of 1784, can it be disregarded in a proceeding in another Court? Or shall it be held as a matter adjudged and settled by competent authority, not subject to re-examination at any time, but by the statutory mode of calling for a re-probate in solemn form, and a trial upon an issue of *devisavit vel non*? *Vaden v Vaden*, 444.
6. *Construction of.* The will of Jacob Adams contained the following clause: "Sixthly. I give to my daughter, Mary Cooper, a negro girl named Celia, during her lifetime, and if she should die without any heirs born of her body, the said negro girl and her increase to return to my estate, and be equally divided among the rest of my children." It is held, that, by this clause the testator disposes of the slave and increase, to his daughter for life, with remainder to his, the testator's, children, in the event she died without "heirs born of her body," which means children. But upon the marriage of the daughter, and the birth of children, the marital right of the husband attached, and, by operation of law, the title to the slaves passed to, and vested in him. *Owen and wife v. Hancock*, 563.
7. *Issue of devisavit vel non. Effect of affirmance, in the Supreme Court, by agreement.* A suit to test the validity of a will is a proceeding *in rem*, and binding upon all the parties in interest, whether parties to the issue or not. And this is so, if there is an affirmance of the judgment of the Court below, by the Supreme Court, upon the agreement of the parties to the issue, provided said agreement is not fraudulent. *Fry, adm'r., v. Taylor*, 594.

See HUSBAND AND WIFE.

WITNESS.

1. *How impeached.* In impeaching the credibility of a witness under our practice, the inquiry is not restricted to the general reputation of the witness for veracity, but it involves his whole moral character. The impeaching witness should, therefore, be asked whether he knows the general reputation of the person whose credibility is in question; what that reputation is, and whether, from such knowledge, the witness would believe him on oath. *Gilliam v. The State*, 38.

2. *Criminal law. Practice.* Where two or more are jointly indicted, and separately tried, it seems that, after trial of one of the parties, and before judgment upon a verdict against him, he may be examined as a witness on behalf of his co-defendants. But, in all such cases, it is the better practice for the Court to render judgment immediately upon the verdict; and in a case where, after verdict against one, the Court would not allow him to be examined for the other, because judgment had not been pronounced upon the verdict, it is held to be an error upon which the latter defendant could claim a new trial. *Delezier v. The State*, 45.
3. *Competency on account of religious belief. How tested. Practice.* In order to test the competency of a witness on account of his religious belief, he may be either interrogated personally concerning it, or his declarations to others upon the subject may be shown. The question, whether or not such declarations have been correctly understood and reported, will, of course, be open to proof of a like character. *Harrel v. The State*, 125.
4. *Forfeiture against. Act of 1794, ch. 1, § 29.* By the act of 1794, ch. 1, § 29, a witness who is regularly summoned is bound to attend from term to term, until discharged by the Court, or the party at whose instance he may have been summoned, under the penalty prescribed, unless, on the return of the *scire facias*, sufficient cause be shown by the witness "of his incapacity to attend at the time and place mentioned in the subpoena." This incapacity must be a personal one, of the witness himself, and the sickness of his wife or other member of his family will not excuse him from attendance. *Slaughter v. Birdwell*, 841.
5. *Question reserved.* In the case of *Duke v. Given*, 4 Yer., 478, the "incapacity" contemplated by the act of 1794, is held to mean a physical incapacity of the witness. Whether or not this restricted sense of the term "incapacity" be warranted, does not arise in this case, and is not determined. *Ibid.*

See EVIDENCE. PRACTICE AND PLEADING.

WRIT OF ERROR.

Effect of upon title. Act of 1835, ch. 20, § 16. By the act of 1835, ch. 20, § 16, if a decree has been executed by a sale of property, either real or personal, before a writ of error is obtained and superseas granted, the title of the purchaser under said decree, is not affected by a reversal of the same upon a writ of error. *Lewis v. Baker*, 885.

WRIT OF INQUIRY.

Proof. Rule as to damages. The effect of an interlocutory judgment by default is, simply, to establish the plaintiff's right to maintain his action and to recover some damages, but the amount, upon an inqui-

sition of damages, remains open to be ascertained by proof; and upon this question both parties have an equal right to be heard. The defendant has the right to show that the plaintiff has no legal claim to damages; and if successful in thus showing, the plaintiff is entitled to nothing more than *nominal damages*. *Turner v. Carter*, 520.

VARIANCE.

See CRIMINAL LAW.

VENUE.

See EJECTMENT.

VIRGINIA, LAW OF.

See SLAVES.

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